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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1392

STATE OF NEVADA, ex rel. ROLAND D. WESTERGARD, State Engineer,

and

BELL BRAND RANCHES, INC., a Nevada corporation, and J. K. WHEELER, an individual, and WHEELER MACHINERY COMPANY, a corporation, a co-partnership, dba W. D. Ranching Co.,

Petitioners,

vs.

SALMON RIVER CANAL CO., LTD., a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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Petitioners,

vs.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

State of Nevada, Intervenor-Appellee and Bell Brand Ranches, Inc., a Nevada corporation, and J. K. Wheeler, an individual, and Wheeler Machinery Company, a corporation, a co-partnership, dba W. D. Ranching Co., Defendants-Appellees, in the Ninth

Circuit Court of Appeals, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on November 21, 1977.

OPINION BELOW

The Opinion of the Ninth Circuit Court of Appeals, the Court below (Appendix A, pp. 1-22) is reported at 564 F.2d 1244 (1977).

JURISDICTION

Orders for Summary Judgment (Appendix B, pp. 23-37) were entered in the Federal District Court for the State of Nevada on November 1, 1974 and May 15, 1975. Jurisdiction thereon was based on diversity of citizenship. (28 U.S.C. §1322) The judgment of the Court of Appeals reversing the District Court's judgment was entered on November 21, 1977. (Appendix A, pp. 1-22). A timely Petition for Rehearing was denied on January 13, 1978 (Appendix B, pp. 38-39). The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

The questions that are requested to be reviewed on Certiorari by this Court are the following:

1. Whether or not the water permit procedure under Nevada Revised Statutes is to be used as an "administrative tool only", (and therefore afforded no res judicata or conclusive effect) requiring subsequent judicial approval to afford that procedure any legal standing.

2. Whether the Court of Appeals erred in failing to apply Rule 56(e) of the Federal Rules of Civil Procedure prior to rendering its Opinion and judgment of reversal.

STATUTES INVOLVED

The state statutes involved in this case are set forth in Appendix C (pp. 40-47).

STATEMENT OF THE CASE

The complaint of Plaintiff and Appellant below, Salmon River Canal Co., Ltd., (Respondent herein) sought to enjoin Defendants-Appellees below, Wheeler, et al. and Bell Brand Ranches, et al. (Co-Petitioners herein), from the continued use of irrigation wells for which approval had earlier been sought and granted by the office of the State Engineer for the State of Nevada. The action was brought in the Federal District Court for the State of Nevada, jurisdiction thereof conferred on the basis of diversity of citizenship. 28 U.S.C. §1322. Following the initial stages of pleading, State of Nevada, ex Rel. Roland D. Westergard, State Engineer, (Petitioner herein),

was permitted to intervene in those proceedings. (Appendix D, pp. 48-51).

Respondent argued below that the wells in question were pumping underground water from sources tributary to the Salmon Falls Creek and as such were in derogation of an agreement dated May 20, 1952 (Appendix D, pp. 52-87) and a judgment and decree of the United States District Court for the District of Nevada dated July 6, 1953 (Appendix D, pp. 88-120), approving such agreement.

Approval for each of the wells that are the subject hereof was obtained under the Nevada Water Law, Nevada Revised Statutes 533.010, et seq. (hereinafter referred to as NRS) and NRS 534.010, et seq. Each application was filed, notice thereof was given as provided by NRS 533.360 and permits therefor issued by the State Engineer. Respondent did not protest any of the applications despite *actual* knowledge of all facts relevant hereto. With regard to Petitioner Wheeler, et al. see the *uncontroverted* facts set out in the Affidavit of Roland D. Westergard, State Engineer for the State of Nevada (Appendix D, pp. 121-123) establishing compliance with the statutory procedure. With regard to Defendant Bell Brand Ranches, et al. see the facts set out in the Affidavit of Roland D. Westergard, State Engineer for the State of Nevada (Appendix D, pp. 124-126), also establishing compliance with the statutory procedure.

The District Court found that the aforesaid procedure was in accord with the Water Law for the State of Nevada. The District Court also found that Respondent had not complied with such statutory procedure. For that and the other reasons set forth in its Orders dated November 1, 1974 and May 15, 1975 (Appendix B, pp. 26, 27, 32, 33) the District Court granted Summary Judgment, dismissing the complaint of Respondent.

From the Orders of Summary Judgment (by the District Court) Respondent appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit Court of Appeals held that the permit procedure utilized by the State Engineer for the State of Nevada was "an administrative tool only", further holding that the District Court "erred in giving conclusive effect to the permit granted by the State Engineer." (Appendix A, p. 5).

From the judgment of the Ninth Circuit Court of Appeals reversing and remanding the matter for further proceedings this Petition for Certiorari is made.

REASONS FOR GRANTING THE WRIT

1. Rule 19(b) of the Supreme Court Rules, Title 28 U.S.C.A., provides that the Supreme Court in its discretion will consider questions that have been decided by the Circuit Courts as to an important question of state law decided in a way to conflict with applicable state law. The rule also provides that this Court will consider matters where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter, or,

where such decision is in conflict with applicable decisions of this Court.

In the instant case, the Opinion of the Ninth Circuit Court of Appeals clearly sets forth the proposition that the statutory procedure employed and followed by the State Engineer for the State of Nevada in granting water permits does not accord such permit any greater dignity than any ministerial function performed by any other state administrative office. As was stated in the Opinion rendered by the Ninth Circuit Court of Appeals:

> "Our review of Nevada's statutory scheme and the relevant general principles of water law of the Western States convinces us that a water permit is an administrative tool only for the use of the State Engineer in administering the State's water." (Appendix A, p. 5).

If this were true, no person who obtained a permit from the State Engineer to appropriate water could rely on it as a basis for developing irrigation systems. A court adjudication would be required before one could safely expend money and effort in applying the water to beneficial use.

The Ninth Circuit Court of Appeals in reaching its decision ignored or disregarded well established principles of law decided *both* by this Court and by other United States Courts of Appeals. It also disregarded (without overruling) a prior decision in the United States District Court for the District of Nevada appertaining thereto.

It has heretofore been held that the exercise by the State of Nevada of such powers of regulation and the vesting in the State Engineer of supervision of the diversion and appropriation of water within the state is constitutional. *Humboldt Lovelock Irrigation Light & Power Co. v. Smith,* 25 F. Supp. 571 (D.C. Nev. 1938). It has also been held that a decision by the State Engineer made after full compliance with the statutory requirements for notice and hearing is final and binding, as well as being constitutionally sound. *Ruddell v. Sixth Judicial District Court,* 54 Nev. 363, 17 P.2d 693 (1933). Also, judicial review thereof is limited to the procedure provided by legislative enactment. *Jahn v. Sixth Judicial District Court,* 58 Nev. 204, 73 P.2d 499 (1937).

NRS 533.365 provides as follows:

> "1. Any person interested may, within 30 days from the date of last publication of the notice of application, file with the state engineer a written protest against the granting of the application, setting forth with reasonable certainty the grounds of such protest, which shall be verified by the affidavit of the protestant, his agent or attorney.
>
> 2. On receipt of a protest, the state engineer shall advise the applicant whose application has been protested of the fact that the protest has been filed with him, which advice shall be sent by registered or certified mail.
>
> 3. *The state engineer shall duly consider the protest, and may, in his discretion, hold hearings and require the filing of such evidence as he may deem necessary to a full understanding of the*

rights involved; but no hearing thereon shall be had except after due notice by registered or certified mail to both the applicant and the protestant. The notice shall give the time and place at which the hearing is to be held and shall be mailed at least 15 days prior to the date set for the hearing.

4. The hearing shall be conducted under such rules and regulations as the state engineer may make, which he is hereby empowered to make, for the proper and orderly exercise of the powers conferred herein; but technical rules of evidence shall not be deemed to apply." (Emphasis supplied)

An aggrieved party can seek redress in the courts from a determination of the State Engineer *in the nature of an appeal,* rather than in the nature of a trial de novo pursuant to NRS 533.450 which reads in part as follows:

"1. Any person feeling himself aggrieved by any order or decision of the state engineer, acting in person or through his assistants or the water commissioner, affecting his interests, when such order or decision relates to the administration of determined rights or is made pursuant to NRS 533.270 to 533.445, inclusive, may have the same reviewed by a proceeding for that purpose, *insofar as may be in the nature of an appeal,* which shall be initiated in the proper court of the county in which the matters affected or a portion thereof are situated; but on stream systems where a decreee of the court has been entered, the action shall be initiated in the court that entered the decree. *Such order or decision of the state engi-*

neer shall be and remain in full force and effect unless proceedings to review the same are commenced in the proper court within 30 days following the rendition of the order or decision in question and notice thereof is given to the state engineer as provided in subsection 3.

. . .

8. Appeals may be taken to the supreme court from the judgment of the district court in the same manner as in other civil cases.

9. *The decision of the state engineer shall be prima facie correct, and the burden of proof shall be upon the party attacking the same.* (Emphasis supplied)

. . ."

Certainly the State Engineer acts in a quasi-judicial capacity as is clearly indicated by application of the provisions of NRS 534.100(1) which reads as follows:

"Existing water rights to the use of underground water are hereby recognized. For the purpose of this chapter a vested right is a water right on underground water acquired from an artesian or definable aquifer prior to March 22, 1913, and an underground water right on percolating water, the course and boundaries of which are incapable of determination, acquired prior to March 25, 1939. *The distinction as to whether water is in a definable aquifer or whether it is percolating water, the course and boundaries of which are incapable of determination, is a matter to be determined by the state engineer."* (Emphasis supplied)

This statutory language defines a water right, makes a distinction as to surface water versus underground

water, and confers upon the State Engineer the *discretion* to make a determination with regard thereto.

It should additionally be noted that the State Engineer performs various other quasi-judicial functions which are not limited solely to ministerial functions as is illustrated by the following statutory references: NRS 533.100(1) and 533.370(1)(2) (Appendix C, pp. 40, 42-43).

In the case at bar, the State Engineer followed the statutory scheme and the giving of notice, which Respondent does not deny. In all other aspects the aforesaid Affidavits of Petitioner Roland D. Westergard, State Engineer, established compliance with what has heretofore been held to be a constitutionally sound statutory procedure. *Humboldt Lovelock Irrigation Light & Power Co. v. Smith,* supra. Respondent chose not to protest any of the subject applications.

Thus, the Respondent, *having had an opportunity to protest any of the subject applications,* and having failed to do so cannot now be heard to complain and seek to set aside the permits earlier granted by this attempted attack.

> "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it *which the parties have had an adequate opportunity to litigate,* the courts have not hesitated to apply res judicata to enforce repose." *U.S. v. Utah Construction & Mining Co.,* 384 U.S. 394, 86 S.Ct. 1545, 16 L.Ed.2d 642, 661 (1966). (Emphasis supplied)

The Opinion of the Ninth Circuit Court of Appeals ignores this well established principle of law by stating that:

> ". . . we are not referred to any adversary proceeding either before the State Engineer or any court of competent jurisdiction where this issue has been conclusively litigated." (Appendix A, p. 9).

However, Petitioners are unaware of any authority requiring the State Engineer to force any protestant into entering an appearance at the administrative level as no such authority exists.

The *practical* effect of the application of the Ninth Circuit Court of Appeals' Opinion and judgment can readily be seen when it is understood that the ruling requires a judicial determination of every action on the part of the State Engineer prior to affording any of those actions finality and dignity in terms of legal standing and conclusiveness. It is not the function of a trial court to substitute its judgment for that of the Office of the State Engineer in a case where Respondent herein failed to give such office an opportunity to administratively hear the complaints of Respondent in an *orderly, timely and meaningful manner.* To allow the finality of the proceedings of the administrative tribunal (Office of State Engineer) to be attacked—after notice and opportunity of hearing—in a subsequent proceeding would run counter to the provisions and purposes of the act under which those proceedings were conducted. *U.S. v. Willard Tablet Co.,* 141 F.2d 141 (CCA 7th Cir. 1944).

Therefore, since Respondent did not exhaust its administrative remedies it must be precluded from any judicial review by either the Doctrine of Collateral Estoppel or Res Judicata. Having failed to exhaust its administrative remedies under available law, Respondent falls within the holding of *Paramount Transport System v. Chauffeurs etc. Local,* 436 F.2d 1064 (CCA 9th Cir., 1971), a case involving a finding by an NLRB trial examiner, with no appeal being taken by the union. The Court there held that the union was foreclosed from litigating material issues decided in the NLRB proceeding on the application of the theory of collateral estoppel in the absence of a showing of lack of procedural and substantive due process. *Certainly no such showing has been advanced by Respondent herein!*

It is also held that determination of an administrative agency, like those of a court, are res judicata in all subsequent proceedings, including proceedings in court. *Scott v. Industrial Accident Commission,* 46 Cal.2d 76, 293 P.2d 18, 22 (1956):

> "The determination of the commission, like those of the superior court, are res judicata in all subsequent proceedings, *including court actions,* between the same parties or those privy to them." (Emphasis supplied)

Clearly, the doctrines of Collateral Estoppel and Res Judicata in this area of the law apply and thus prevent Respondent from collaterally attacking the ruling of the office of the Nevada State Engineer within the holding of *S.E.C. v. Central-Illinois Secu-*

rities Corporation, 338 U.S. 96, 69 S.Ct. 1377, 93 L.Ed.2d 1836 (1949). The *S.E.C.* case involved a simplification proceeding before that agency arising out of a dispute over valuation in a liquidation preference. The Court ruled that the aggrieved party could not seek judicial re-examination of the material issues in the absence of a showing of insufficient evidence or a showing of no compliance with legal standards. No such contention has been made in the case at bar—either by Respondent or by the Ninth Circuit Court of Appeals in its Opinion.

By even a cursory examination of the legal authorities cited herein, it is abundantly clear that the Opinion of the Ninth Circuit Court of Appeals is in conflict with decided case authorities from other United States Circuit Courts of Appeals as well as being in conflict with decided cases in this Court—as well as prior decisions in the Ninth Circuit Court of Appeals itself!

The decision of the Ninth Circuit Court of Appeals likewise places in doubt the system of adjudication of water rights in the various Western States since the Opinion states that it was based upon a review of ". . . water law of the Western States . . ." (Appendix A, p. 5).

The problems inherent in the practical application of the Opinion of the Court of Appeals can succinctly be summarized by the following: By a literal application of the Opinion, no action taken by the Office of the State Engineer with regard to an application

or permit procedure is valid and conclusive unless it has withstood the test of judicial determination. Certainly this was not the intention of the various Legislatures which have contributed to the present concept of Nevada Water Law, nor is it believed by Petitioner herein to be a fair interpretation of the numerous case authorities in furtherance of litigation surrounding such matters.

The invidious feature of the literal and practical application of the Opinion of the Ninth Circuit Court of Appeals can clearly be seen by the following three illustrations:

A. A property owner proceeds to make application to the State Engineer's Office for a well permit. The application is properly noticed, processed, and a permit issued and the applicant thereupon proceeds with the drilling and perfecting of a well and the putting of water to beneficial use—all at a substantial capital cost. Thereafter, any other holder of a prior right would then (on the basis of the instant Opinion) be permitted to collaterally attack the permit even though he may have slept on his rights by failing to timely protest the application—*as was the case with Respondent herein!*

B. Assume that there existed unappropriated waters on the source and a series of permits were granted over an extended period of years. Would the periodic granting of the permits be culminated by a subsequent "validation proceeding" as to all rights to include a ratable reduction (or increase) in rights or other modifications of earlier so-called vested

rights? Such a result is certainly mandated by the Opinion of the Court of Appeals since failure to judicially "perfect" an earlier right would not place the holder of such right in any better position than the holder of a right later in time.

C. Evaluate the position of a property owner who had been the subject of an order of *denial* by the State Engineer. NRS 533.370(4) imposes upon the State Engineer an obligation to enter such an order of denial in the event that he finds that there does not exist unappropriated waters on the source. On those facts, is a judicial adjudication of this matter in order to clothe such action with some validity?

These results are impermissible, and can be avoided by application of the provisions of NRS Section 533.430(1) which confers upon the State Engineer the jurisdiction and authority to perform *quasi-judicial* regulation and control *after* the permits are issued to the same extent as rights which have been adjudicated and decreed under other provisions of the chapter. Said section reads as follows:

> "1. Every permit to appropriate water, and every certificate of appropriation granted under any permit by the state engineer upon any stream or stream system which shall have been adjudicated under the provisions of NRS 533.090 to 533.235, inclusive, shall be, and the same is hereby declared to be, *subject to existing rights* and to the decree and modification thereof entered in such adjudication proceedings, and the same shall be *subject to regulation and control by the state engineer* and the water commissioners *in the*

> *same manner and to the same extent as rights which have been adjudicated and decreed under the provisions of this chapter.* Every such holder of a certificate or a permit shall in like manner be subject to all of the provisions of NRS 533.270 to 533.305, inclusive, 533.465, 533.480, 535.050 and 536.010 to 536.030, inclusive." (Emphasis supplied)

Thus, the function being performed by the State Engineer under this statute is clearly quasi-judicial and not merely the functioning of an "administrative tool" as was characterized by the Ninth Circuit Court of Appeals.

Therefore, by application of the provisions of NRS 533.430(1) we avoid the unconscionable result that would be achieved by application of the illustrated fact situations referred to above. It has been recognized that the doctrines of primary jurisdiction and exhaustion of administrative remedy overlap to such an extent that distinction between the two becomes difficult or impossible. 3 Davis, Administrative Law Treatise (1958 ed.), § 19.01; *Hewitt-Robins v. Freight-Ways,* 371 U.S. 84, 83 S.Ct. 157, 9 L.Ed.2d 142 (1962). The State Engineer is thus clothed with *primary jurisdiction* the principles of which have been worked out by this Court for the better functioning of the courts and administrative agencies in areas where both have legitimate concern. *Seatrain Lines v. Pennsylvania R. Co.,* 207 F.2d 255 (CCA, 3d Cir. 1953); *Far East Conference v. United States,* 342 U.S. 570, 72 S.Ct. 492, 96 L.Ed. 576 (1952). The

application of the doctrine is particularly pertinent where the function of the administrative agency and the particular decision sought to be reviewed by the Court involves the exercise of discretionary powers granted to the agency by the Legislature, or require application of special expertise. Id.; *McKart v. United States,* 395 U.S. 185, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969). The *McKart* case, like this one, involved a situation where the administrative agency's procedure was at an end and the party sought judicial review of a decision that had not been appealed through the established administrative procedure. This Court, in refusing to exercise such judicial review, stated, at 395 U.S. 185, 194-195, 89 S.Ct. 1657, 1663, 23 L.Ed. 2d 194, 204 (1969):

> "Particularly, judicial review may be hindered by the failure of the litigant to allow the agency to make a factual record, or to exercise its discretion or apply its expertise. In addition, other justifications for requiring exhaustion in cases of this sort have nothing to do with the dangers of interruption of the administrative process. Certain very practical notions of judicial efficiency come into play as well. A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene. And notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors. Finally, it is possible that frequent and deliberate flouting of administrative processes should weaken the effectiveness of an agency by encouraging people to ignore its procedures."

The *McKart* case also recites that the doctrine of exhaustion of administrative remedy provides "that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *McKart*, supra at p. 1662. The case of *Marnell v. United Parcel Service of America, Inc.*, 260 F.Supp. 391 (N.D. Cal. 1966), indicates that the doctrine of primary jurisdiction is sometimes mentioned in connection with cases in which an action is commenced in court for certain relief, the granting of which has been exclusively entrusted by a regulatory statute to an administrative agency. This is exactly the situation herein, in that Nevada Water Law delegates to the State Engineer the responsibility for hearing protests to the granting of water rights permits. NRS 533.365.

The *Marnell* opinion holds, in such a case, that the judicial function has simply been superseded by a statutory scheme for administrative remedy. Although direct judicial review of the administrative action is provided for, the Court does not act until the administrative agency has ruled on the protest. Nevada Law is in accord—where the complaining party has failed to follow the statutory provisions relating to protest to the administrative agency; that party has lost his remedy and may not go directly to Court. *State of Nevada v. Wright,* 4 Nev. 251 (1868). This Court is in accord with this principle. No one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. *McKart v. United States,* supra; *Myers v. Bethlehem Shipbuilding Corporation,* 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (1938).

The *Jahn* case, supra, makes it clear that the Nevada Water Law was intended by the Legislature to devolve the functions of division and regulation of distribution of waters upon the State Engineer and not the courts. It is proper for a legislature to grant such discretionary power to an administrative officer or agency. *Kaoru Yamataya v. Fisher,* 189 U.S. 86, 23 S.Ct. 611, 47 L.Ed. 721 (1903); *United States v. George S. Bush & Co.*, 310 U.S. 371, 60 S.Ct. 944, 84 L.Ed. 1259 (1940). When the administrative agency or officer finds that it has jurisdiction over the matter before it, such finding is not subject to collateral attack by one who has failed to protest at the administrative level. *Nelson v. Oro Loma Sanitary Dist. of Alameda County,* 101 Cal.App.2d 349, 225 P.2d 573 (Cal.App. 1950). Even if the administrative agency's decision was erroneous, it would have the effect of a judgment of a court of competent jurisdiction, when no proper appeal has been taken. *Dennison v. Payne,* 293 F. 333 (CCA 2nd Cir. 1923).

If a person feels that his rights are being prejudiced, the time and place to complain is before the administrative agency authorized to hear the matter. *Woo Foo Wong v. Wixon,* 117 F.2d 926 (CCA 9th Cir. 1941). Failure to follow such protest procedure constitutes a waiver of all rights involved in the matter. *Nelson v. Oro Loma Sanitary Dist. of Alameda County,* supra; *Round Mountain Mining Co. v.*

Round Mountain Sphinx Mining Co., 36 Nev. 543, 138 P. 71 (1914).

Despite the provisions regarding judicial review of the State Engineer's decision, Respondent herein has gone directly to court seeking an injunction that would nullify said Engineer's decision. An analogous situation developed in the case of *In re Water Rights in the Humboldt River Stream System*, 49 Nev. 357, 246 P. 692 (1926), where the opinion states that such an application for an injunction is not in the nature of an appeal. The Court held that such a matter involving the State Engineer's decision had to be presented to the Court in strict accordance with the statutory scheme.

To summarize this portion of Petitioner's argument, the doctrine of primary jurisdiction or exhaustion of administrative remedy is properly invoked against Respondent herein, because the statutory provisions for judicial review have not been followed. Water Law is a complex and specialized field and administration and control thereof in the State of Nevada has properly been delegated by the Legislature to the State Engineer. This delegation cannot be ignored; the basic premise of proper delegation by the Legislature and expertise are both directly involved in this case. It is a classic case for application of the doctrine of primary jurisdiction.

2. The Ninth Circuit Court of Appeals also erred in not affirming the Summary Judgments earlier entered by the District Court in failing to assign significance to Rule 56(e) of the Federal Rules of Civil Procedure as to responses to Motions for Summary Judgment. Said rule provides:

> "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

The record before the Ninth Circuit Court of Appeals disclosed the fact that the Respondent below *did not file a single responsive pleading* to the Motion for Summary Judgment (as to *Wheeler,* et al.) as is required by an application of that rule. The Affidavit filed as to Bell Brand Ranches, Inc. was inadequate

to meet the test of this rule, above. (Appendix D, pp. 127-132). In failing to follow its own prior rulings, the Court of Appeals ignored *Miller v. Western Board of Adjusters, Inc.,* 427 F.2d 175 (CCA 9th Cir., 1970). The *Miller* case, *supra* at 176, by citing *Lundeen v. Cordner,* 356 F.2d 169, 170 (CCA 8th Cir., 1966), stated:

> "The law is equally clear that when a moving party presents an adequately supported motion for summary judgment (as was done herein [and as was done in the instant case]) the adverse party *must* come forward with *facts,* not allegations, which controvert the necessary facts set forth in the moving party's case. Rule 56(e) clearly spells out this duty on the sanction of suffering of a summary judgment (Emphasis supplied)."

CONCLUSION

By simple application of the practical effect of the Opinion of the Ninth Circuit Court of Appeals, it can readily be established that Nevada Water Law will be thrown into a hopeless state of uncertainty and conflict. In addition, the Opinion is in conflict not only with principles of law set down by other United States Courts of Appeal but is also in conflict with well established principles of law in cases heretofore set down by this Court!

For the reasons aforesaid, it is respectfully urged that this Court grant Certiorari and consider the

matters set forth herein as these matters vitally affect the State of Nevada and the entire concept of its Water Law owing to the Ninth Circuit Court of Appeals ". . . unnecessary intrusion into Nevada Water Law." (See the concurring Opinion of Judge Schwarzer) (Appendix A, pp. 21-22). These matters also substantially affect all of the other arid Western States for the reasons earlier stated.

By its ruling, the Ninth Circuit Court of Appeals brings us squarely within Supreme Court Rule 19(b) because:

1. The Ninth Circuit Court of Appeals has entered an Opinion and Judgment on an important question of State Law decided in a way to conflict with applicable State Law, by stating that: "We do not believe that as an administrative tool it can be binding or conclusive on any party where it is asserted that pre-existing rights and subsequent appropriations conflict." (Appendix A, pp. 5, 6).

2. The ruling is in conflict with prior decisions of this Court.

3. The ruling is in conflict with decisions of other United States Courts of Appeal.

4. The ruling is in conflict with decisions of the Ninth Circuit Court of Appeals.

5. The ruling decides an important State question in a way in conflict with applicable State law.

6. The ruling so far departs from the accepted and usual course of judicial proceedings as to call

for an exercise of this Court's power of supervision (relative to the disregard of Rule 56(e) FRCP).

March 23, 1978.

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Appendix A

OPINION OF THE UNITED STATES COURT OF APPEALS UNDER DATE OF NOVEMBER 21, 1977

In the United States Court of Appeals
for the Ninth Circuit

No. 75-2462

Salmon River Canal Co., Ltd., a corporation,
Plaintiff-Appellant,
vs.
Bell Brand Ranches, Inc., a Nevada corporation, and J. K. Wheeler, an individual, and Wheeler Machinery Company, a corporation, a co-partnership, dba W. D. Ranching Co.,
Defendants-Appellees.

[Nov. 21, 1977]

Appeal from the United States District Court
for the District of Nevada

OPINION

Before: KILKENNY and ANDERSON, Circuit Judges, and SCHWARZER,* District Judge.

ANDERSON, Circuit Judge:

Appellant, the Salmon River Canal Co., an Idaho corporation owning ranch land in Nevada, brought a diversity action in the federal district court in Nevada seeking to enjoin appellees, Bell Brand Ranches, Inc. and J. K. Wheeler and Wheeler Machinery Company, from pumping water from wells located on neighboring lands. The district court granted appellees' summary judgment motions and appellant timely filed this appeal. Our jurisdiction rests upon 28 U.S.C. § 1291.

Roland D. Westergard, the Nevada State Engineer, was permitted intervention by the District Court and urges affirmance of the District Court judgment.

The essential facts are not disputed and disclose that appellant, during the 1940's, acquired several ranches in the Salmon River drainage in Nevada. In an effort to settle years of bickering over water rights, appellant brought an action in 1950 in the federal district court in Nevada against the other ranchers in the area, including the predecessors in interest of appellees. In 1953, a judgment was entered embodying the terms of a settlement agreement the parties had reached apportioning the water of the Salmon River and its tributaries.

*The Honorable William W. Schwarzer, United States District Judge for the Northern District of California, sitting by designation.

The judgment provided that the predecessors in interest of J. K. Wheeler and Wheeler Machinery Co. could divert as much water from Shoshone Creek, a tributary of the Salmon River, as they needed for household purposes and for irrigation of 424 acres specifically described in the judgment. The judgment, an unusual one in Western water law, permitted the use of as much water as desired as long as it was confined to the specified acreage. Similar provisions were made with respect to the appropriation of water to irrigate a certain specified acreage owned by the predecessors in interest of Bell Brand Ranches. The judgment also adopted an Opinion and Order of the State Engineer of Nevada to the effect that "the waters of the Salmon River (sometimes referred to as Salmon Creek or Salmon Falls Creek) and its tributaries in Elko County, Nevada, are fully appropriated and that no further permits will be granted for irrigation use on the stream system within the State of Nevada." The judgment also, by its terms, bound the successors in interest of the lands described in the judgment and, finally, the judgment decreed:

> "31. This Court shall retain jurisdiction over matters of interpretation of this decree and matters relating to the administratioin and enforcement thereof."

In 1966, J. K. Wheeler and Wheeler Machinery Co. applied to the State Engineer of Nevada for permission to pump water from a well to irrigate 240

acres. In 1967, J. K. Wheeler and Wheeler Machinery Co. filed a second application to pump water from a second well to irrigate 400 acres. The land to be irrigated under both applications did not lie within the specified acreage described in the 1953 judgment. In 1967, the predecessor in interest of Bell Brand Ranches likewise applied for permission to use well water to irrigate lands outside the specified acreage described in the 1953 judgment. Notice of all three applications, including a general description of the lands to be irrigated and a listing of the source as underground, were published in a local newspaper. No timely protests were filed to any of the three applications and the State Engineer granted the permits "subject to all existing rights on the source."

On July 16, 1971, appellant brought the present action, contending that the underground waters were tributary to the Salmon River and that the use of such waters on lands other than those specifically described in the 1953 judgment interferes with appellant's water supply and is a violation of the 1953 judgment.

As stated, the district court granted appellees' summary judgment motions. Essentially, the basis of the district court's ruling was that when appellees filed their applications for permits to appropriate water, and when notices of these applications were published the appellees gave notice of two claims: first, that there were unappropriated waters available for ap-

propriation[1] and, second, that the appellant intended to use these waters to irrigate lands other than those described in the 1953 judgment. Further, that when the State Engineer, pursuant to N.R.S. § 533.370(4) (see *infra* p. 6, issued the permits to appellees he "necessarily had to find that the underground source was not tributary to the stream system because he knew, and, in fact, had specially declared in 1952 that the waters of the Salmon River and its tributaries are fully appropriated." The court ruled that since appellants had failed to protest the applications or to appeal from the State Engineer's determination, that the present suit constituted a collateral attack upon the State Engineer's determination and that said determination was res judicata and not subject to collateral attack.

We believe that the district court erred in giving conclusive effect to the permit granted by the State Engineer. Our review of Nevada's statutory scheme and the relevant general principles of water law of the Western States convinces us that a water permit is an administrative tool only for the use of the State Engineer in administering the State's water. We do not believe that as an administrative tool it can be

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[1]This conclusion by the district court does not necessarily follow, for N.R.S. § 534.110(5) states:

> "Nothing herein shall be so construed as to prevent the granting of permits to applicants later in time on the ground that the diversions under such proposed later appropriations may cause the water level to be lowered at the point of diversion of a prior appropriation, so long as the rights of holders of existing appropriations can be satisfied under such express conditions."

binding or conclusive on any party where it is asserted that pre-existing rights and subsequent appropriations conflict. In reaching this conclusion we bear prominently in mind this Circuit's rule that we pay great deference to the district court's determination of state law and do not reverse unless convinced that the decision below was clearly erroneous. *d'Hedouville v. Pioneer Hotel Co.*, 552 F. 2d 886, 895 (9th Cir. 1977). In this case we have an abiding conviction that the district court was wrong in its conclusion. Our review of the record discloses that many of the statutory sections and cases discussed in this opinion were never called to the attention of the district court.

We start our analysis with a review of the Nevada statutory scheme regarding water rights. We initially note that the provisions relative to permit application proceedings are found under a different subchapter heading from those dealing with the adjudication of vested water rights. Compare N.R.S. § 533.325 et seq. with N.R.S. § 533.090 to § 533.320, inclusive. Although this fact is by no means conclusive of the issues before us, it is some evidence that the drafters felt that the two proceedings were distinct.

Turning first to the permit application provisions (N.R.S. § 533.325, et seq.), we believe that the approval of an application for an appropriative permit, although involving some discretion under statutory criteria, is largely ministerial. By N.R.S. § 533.370.1 the Nevada Legislature has directed, in pertinent part, that:

> "1. Except as provided in subsection 2, [not relevant to our discussions] the state engineer *shall* approve *all* applications made in proper form where all fees, as provided in this chapter, have been paid which contemplate the application of water to beneficial use, and where the proposed use or change does not *tend* to impair the value of existing rights, or to be otherwise detrimental to the public welfare." (emphasis added)

This provision contemplates that the only determination made by the state engineer, other than proper form and payment of fees, is one of a "tendency" only not to impair existing rights. A mere "tendency" could not be a final determination in the res judicata or collateral estoppel sense as applied in judicial and administrative adversarial proceedings. The determination of whether or not there is an actual conflict in existing rights is left open to future determinations of relative rights as provided for by other provisions of the statutory scheme.

The explicit condition of the permits granted in this case, that it is "subject to existing rights on the source," also convinces us that the permits granted were not intended to be conclusive. This language is mandated by N.R.S. § 533.430(1) which states in pertinent part:

> "1. Every permit to appropriate water, and every certificate of appropriation granted under any permit by the state engineer upon any stream or stream system which shall have been adjudicated under the provisions of NRS 533.090

> to 533.525, inclusive, shall be, and the same is hereby declared to be, subject to existing rights and to the decree and modifications thereof entered in such adjudication proceedings, and the same shall be subject to regulation and control by the state engineer and the water commissioners in the same manner and to the same extent as rights which have been adjudicated and decreed under the provisions of this chapter. . . ."

This section is further evidence that the permit application proceeding was not considered to be an adjudication of the relative water rights but rather only for the administrative use of the State Engineer to aid in his supervision of the State's waters.

We are mindful of the language in N.R.S. § 533.370 (4) which states:

> "4. Where there is no unappropriated water in the proposed source of supply or where its proposed use or change conflicts with existing rights, or threatens to prove detrimental to the public interest, the state engineer shall reject the application and refuse to issue the permit asked for."

We believe that a determination made under this section is solely for the administrative use of the State Engineer and highlights the importance of the language "subject to existing rights on the source." If it may develop that there is in fact no unappropriated water on the source or the proposed use will conflict with existing rights, the contrary prior determination of the State Engineer will not defeat the interests of the prior water right holder for he is still protected by the language "subject to all existing

rights on the source." *See Cappaert v. United States*, 426 U.S. 128, 146-147 (1976).

Using N.R.S. § 533.370(4), appellees contend that since the State Engineer could not have issued the permit if there was no unappropriated water in the source, then by his grant of the permit the State Engineer "necessarily" determined that the underground waters were not tributary to the surface waters of the Salmon River. The district court accepted this contention. However, there is nothing of a factual nature in this record that supports this conclusion. Whether or not the two sources are interdependent or independent of each other, and if interdependent, what effect pumping from the ground source will have on the existing surface rights is virtually the entire thrust of appellant's present claim. Yet, we are not referred to any adversary proceeding either before the State Engineer or any court of competent jurisdiction where this issue has been conclusively litigated.

There is evidence in this record that the alleged determination "necessarily" made is at odds with a subsequent opinion of the State Engineer. At pp. 1035-1937 (sic) of the record there is an opinion and ruling of the State Engineer dated May 6, 1971, dealing with well permits appropriating underground waters in the same Salmon River basin which, by direct inference, holds that these underground waters are tributary to the Salmon River, but nonetheless the permits were issued on a *de minimis* theory. This finding that underground waters were tributary

directly conflicts with the State Engineer's issuance of the permits in this case.

It cannot be assumed, as argued by appellees and intervenor, that the October 6, 1952, unilateral opinion and order of the State Engineer, declaring that the waters of the Salmon River and its tributaries were fully appropriated, did not include underground water, for that assumption begs the very question at issue in this case, i.e., what is the meaning of "tributaries" as used in the 1952 agreement, the 1952 opinion of the State Engineer and the 1953 decree?

We also note that there is no statute, called to our attention or found in independent research, that requires a protest at the peril of losing pre-existing rights by failing to protest. Nor has any case been brought to our attention, either in Nevada or from any of the arid Western States, which holds that a failure to protest a permit application will render the determinations made in the application final and conclusive to the extent that they may impair or obliterate pre-existing rights.

Our review of the Nevada permit procedures convinces us that an issued permit creates only a public record of a claimed right for water use administration. It does not create a right as against prior "existing rights on the source."

Our conclusion is also fortified by a review of the adjudication of vested water rights provisions of the Nevada Code. It is significant that the Nevada statutory scheme contemplates an administrative determination of the relative rights of water rights claimants

on a stream or stream system under N.R.S. § 533.090,[2] et seq. Under these provisions the administrative determination is only a stepping stone into the judicial system, for such determination, when filed with the Clerk of the court, shall have the legal effect of a complaint in a civil action." N.R.S. 533.160(1). The court then, after notice, conducts a hearing, taking such testimony as necessary, and then affirms or modifies the State Engineer's order. The Code also provides that the decree entered by the court "shall be final and shall be conclusive upon all persons and rights lawfully embraced within the adjudication. . . ." N.R.S. 533.210(1). There is no allegation or proof that any such proceeding has been requested or undertaken with respect to the waters in the stream system in question here. The existence of this administrative method for determination is further convincing evidence that the mere application

[2]N.R.S. § 533.090 provides:

"1. Upon a petition to the state engineer, signed by one or more waters users of any stream or stream system, requesting the determination of the relative rights of the various claimants to the waters thereof, the state engineer shall, if upon investigation he finds the facts and conditions justify it, enter an order granting the petition and shall make proper arrangements to proceed with such determination.

"2. The state engineer shall, in the absence of such a petition requesting a determination of relative rights, enter an order for the determination of the relative rights to the use of water of any stream selected by him, commencing on the streams in the order of their importance for irrigation. As soon as practicable after the order is made and entered, the state engineer shall proceed with such determination as provided in this chapter.

"3. A water user upon or from any stream or body of water shall be held and deemed to be a water user upon the stream system of which such stream or body of water is a part or tributary."

and permit procedures of the Nevada Code were never intended to have the conclusive effect now asserted by appellees.

The Nevada Code also provides that a suit may be brought in state district court for a determination of relative rights. N.R.S. 533.240.[3] This section also provides that "[t]he court *may* at any time transfer the suit to the state engineer for determination as provided in this chapter." (emphasis added) N.R.S. 533.240(4). This discretionary provision discounts any notion, alternately relied upon by the district court in this case, that the State Engineer has primary and exclusive jurisdiction. This view that the State Engineer does not have exclusive and primary jurisdiction is fortified by the plain language of N.R.S. 533.310 which recognizes that adjudications may have

[3]N.R.S. § 533.240 provides:

"1. In any suit brought in the district court for the determination of a right or rights to the use of water of any stream, all persons who claim the right to use the waters of such stream and the stream system of which it is a part shall be made parties.

"2. When the suit has been filed, the court shall direct the state engineer to furnish a complete hydrographic survey of the stream system as provided in N.R.S. 533.100 in order to obtain all physical data necessary to the determination of the rights involved.

"3. The cost of the suit, including the costs on behalf of the state and of the surveys, shall be charged against each of the private parties thereto based on a determination by the court of the relative merits of the claims made by each of the private parties. The court may assess and charge against any party at any time during the suit an equitable amount to pay the costs of the survey upon its approval of an itemized statement therefor submitted by the state engineer.

"4. The court may at any time transfer the suit to the state engineer for determination as provided in this chapter.

taken place in a suit in the state district court "in which suit [district court adjudication where a final decree has been entered] the adjudication and determination was *not* had in the manner provided in N.R.S. 533.090 to 533.265, inclusive, . . ." (emphasis supplied) Additionally, the state court appellate review procedures, specifically relied upon by appellees in this case to oust the federal district court of jurisdiction, also provide that "on stream systems where a decree of court has been entered, the action shall be initiated in the court that entered the decree." N.R.S. § 533.450(1). This provision appears to recognize the continuing jurisdiction of a court to construe and effectuate its own decrees. For stronger reasons, this result must follow where, as here, the court has expressly reserved jurisdiction to do so.

We believe that it is obvious from our comparison of the permit application provisions and the adjudication provisions that each proceeding is distinct with different effects attaching to each. Only when an adjudication of relative rights is undertaken in accordance with N.R.S. 533.090, et seq., or by institution of a suit in state district court as envisioned by N.R.S. 533.240 can a determination made thereunder be given a conclusive effect. The permit application proceedings do not have such conclusive effect and can only attain that status after being subject to the above-described adjudication proceedings.

We also observe that our conclusion is shared by the commentators. *See* 1 HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN

STATES, p. 338 (1971);[4] 2 WEIL, WATER RIGHTS IN THE WESTERN STATES, § 1194, pp. 1105-1106, (1911);[5] and 3 KINNEY, IRRIGA-

[4]In his treatise Mr. Hutchins states at page 338:

"The conclusion of the administrator that the permit applied for will or will not impair existing water rights is not conclusive or binding on any party.[559] It is made for the administrative use of the State agency in passing on the application pending before it. This decision is subject to review in the courts, in which the matter of impairment of existing rights may be judicially determined as between the conflicting claimants.

"The State Engineer is an administrative, not a judicial officer. In deciding whether an application to appropriate water should be approved or rejected, he exercises an executive function—to ascertain for his own guidance whether there is reason to believe from the evidence that there are unappropriated waters in the proposed source of supply which can be appropriated without impairing existing rights.[560] This determination merits consideration by the judiciary, but it has no binding force on the final determination of the latter.[561] But even if a permit should be issued, and the administrative act be not overturned by the reviewing court, the permit still would be junior to all preexisting rights of appropriation that attach to the same source of supply. An attempt to exercise it in contravention of these preexisting rights would be subject to injunction."

The corresponding footnotes are:

[559]*Motl v. Boyd*, 116 Tex. 82, 126-127, 286 S.W. 458 (1926).

[560]*Bullock v. Tracy*, 4 Utah (2d) 370, 373, 294 Pac. (2d) 707 (1956).

[561]*American Fork Irr. Co. v. Linke*, 121 Utah 90, 93-94, 239 Pac. (2d) 188 (1951).

[5]It is found in Mr. Weil's treatise that:

"Since the authority of the water officials is administrative and not judicial, and they have no power to impair vested rights, their decision as to what existing rights are is not conclusive."

• • • •

". . . not only may a party feeling himself aggrieved by the State Engineer's action appeal therefrom in the method usually allowed by these statutes, but the action of the State Engineer is open to judicial inquiry in any other proceeding in court, such as an injunction against a party holding the State Engineer's permit, whether the decision of the State Engineer is directly appealed from or not. . . . The hearing

TION AND WATER RIGHTS, pp. 2463-2464 (2nd Ed. 1912).[6] Mr. Hutchins, in his treatise, specifically refers to the Nevada water code, and states:

"The original water administration law of Nevada contained a provision based on those of Wyoming and Nebraska purporting to make the State Engineer's determination of water rights conclusive, subject to the right of appeal. This was believed by a majority of the Nevada Supreme Court to

before the State Engineer is *ex parte* and administrative only.[21]"

The corresponding footnote is:

[21]*Waha, etc. Co. v. Lewiston Co.* (Idaho), 158 Fed. 137.

[6]Mr. Kinney states in his treatise that:

"Although it is held by the Supreme Courts of all the States which have adopted the laws of State control that the State Engineer and the Governing Board have only ministerial, administrative, or executive powers under the law, these powers are judicial in character or at least quasi-judicial.

• • • •

"As discussed in the preceding section, the officers under the laws of State control having but ministerial, administrative, or executive powers, it therefore follows that although they are at times given quasi-judicial powers, their decisions are not binding upon the courts.[1] And it may be said in general that their decisions may be attacked directly, collaterally, or by appeal, and when so attacked, the question is tried *de novo* by the courts."

The corresponding footnote is:

[1]*Farm Investment Co. v. Carpenter*, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L.R.A. 747, 87 Am. St. Rep. 918; *Willey v. Decker*, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939; *Ryan v. Tutty*, 13 Wyo. 122, 78 Pac. Rep. 661; *Whalon v. North Platte etc. Co.*, 11 Wyo. 313, 71 Pac. Rep. 995; *Waha etc. Co. v. Lewiston etc. Co.*, 158 Fed. Rep. 137; *Speer v. Stephenson*, 16 Idaho 707, 102 Pac. Rep. 365.

But see *Crawford Co. v. Hathaway* (Hall), 60 Neb. 754, 84 N. W. Rep. 271; *Id.*, 61 Neb. 317, 85 N. W. Rep. 304; *Id.*, 67 Neb. 325, 93 N. W. Rep. 781, 60 L.R.A. 889, 102 Am. St. Rep. 647; *Rasmussen v. Blust*, 85 Neb. 198, 122 N. W. Rep. 862, 133 Am. St. Rep. 650; *Id.*, 83 Neb. 678, 120 N. W. Rep. 184; *Cline v. Stock*, 71 Neb. 70, 98 N. W. Rep. 454, 102 N. W. Rep. 265; *McCook Irr. Co. v. Crews*, 70 Neb. 115, 102 N. W. Rep. 249; *Farmers' Canal Co. v. Frank*, 72 Neb. 136, 100 N. W. Rep. 286.

be unconstitutional."[476] The law was promptly changed by the legislature to conform to the Oregon system in which judicial as well as administrative process is requisite to the effectiveness of the determination."[477] The amended Nevada procedure was held valid. "[478]"
1 HUTCHINS, *supra,* at 319-320.[7]

As stated earlier in this opinion, we have found no case directly in point, either pro or con. However, in our review of the case law we have uncovered cases in which the language used inferentially supports our view. Such cases include: *Glenn Dale Ranches, Inc. v. Shaub,* 494 P.2d 1029 (Idaho 1972);[8] *City of Albuquerque v. Reynolds,* 379 P.2d 73 (N.M. 1963);[9] *Little Cottonwood Water Co. v. Sandy City,*

[7]The corresponding footnotes are as follows:
[476]*Ormsby County v. Kearney,* 37 Nev. 314, 355-392, 142 Pac. 803 (1914).
[477]Nev. Laws 1915, ch. 253.
[478]*Vineyard Land & Stock Co. v. District Court,* 42 Nev. 1, 14-26, 171 Pac. 166 (1918); *Bergman v. Kearney,* 241 Fed. 884, 906, 908-910 (D. Nev. 1917).

[8]In *Glenn Dale Ranches,* the Idaho Supreme Court stated:
"Nor does existence of a permit dating to 1930 establish a prior appropriation. The permit evidences the state's consent to a proposed diversion, but it does not prove the fact of diversion or of application of the water diverted to a beneficial use." 494 P. 2d at 1031.

[9]In this case the Supreme Court of New Mexico stated:
"In the western states, where the public waters are held subject to use by prior appropriators, it has always been the law that a prior appropriator from a stream may enjoin one from obstructing or taking waters from an underground source which would otherwise reach the stream and which are necessary to serve the stream appropriators' prior right." [cites omitted] 379 P. 2d at 79.

258 P.2d 440 (Utah 1953);[10] *Lockwood v. Freeman,* 98 P. 295 (Idaho 1908);[11] *United States v. District Court,* 238 P.2d 1132 (Utah 1951)[12] and *American Fork Irr. Co. v. Linke,* 239 P.2d 188 (Utah 1951).[13]

One case found in our search is more closely in point and deserves separate discussion. In *Chappellet*

[10]The Supreme Court of Utah stated:
"Here we are concerned only with whether the application to appropriate should be approved. The effect of such an approval is to allow the applicant to proceed with his plans to try to appropriate new water. It does not adjudicate that there are unappropriated waters in the source claimed nor that the proposed plan or system will have the effect of producing such waters. It merely has the effect of allowing the applicant to proceed with their plans to appropriate unappropriated waters." 258 P.2d at 444-445.

[11]In *Lockwood, supra,* the Idaho Supreme Court stated:
"Counsel for appellants appear to lay special stress upon the fact that the appellants received a license from the state engineer to appropriate water from said stream. There is nothing in that contention whatever as it is clearly shown that all of the waters of said creek had been appropriated by the respondent and his grantors long before any license was applied for by the appellants from the state engineer. The state engineer has no authority to deprive a prior appropriator of water from any streams in this state and give it to any other person. Vested rights cannot thus be taken away." 98 P. at 296.

[12]The Supreme Court of Utah stated:
"Whether or not we call the engineer's decision administrative and the district court's decision judicial, no rights to the use of water accrue by the mere approving or rejecting of an application, the only thing thereby determined is whether the applicant may proceed in accordance with the statute to perfect the right applied for." [cite omitted] 238 P. 2d at 1136.

[13]The Supreme Court of Utah stated:
"Also that although such findings and decisions, administrative in nature, merit studied consideration and great weight, nevertheless the judiciary is the sole ultimate arbiter of law and fact in water cases, bound neither by the nature, extent or content of his decision, nor as to the character, quantum or quality of proof, evidence or data adduced at hearings before him or accumulated independently by his office." 239 P. 2d at 190-191.

v. Birbeck, 296 P.2d 946 (Nev. 1956), the lessors of certain farm lands brought a damage action against the lessees for a breach of the lease. The lessees had previously notified the lessors that they were electing to terminate the lease, relying upon a provision of the lease that gave them such right "[i]n the event that there is an insufficient supply of water . . . to properly irrigate." The lessors had a water right appurtenant to the lands in question to divert 5 c.f.s. of underground water. The lessees produced expert testimony at trial that the underground source was only capable of providing no more than .085 c.f.s. of water, which was insufficient to irrigate. The lessors contended that their water right gave them the right to pump 5 c.f.s. of water and that it was error for the court to receive lessees' expert testimony as being "an improper attack upon their water right and upon the determinations of the state engineer upon which it was based." The Supreme Court of Nevada responded:

> "Defendant's evidence was no attack upon lessors' *water right*. The evidence served simply to establish factually the extent of the limitations which the certificate recognized to exist." [emphasis in original] 296 P.2d at 949.

In the present case, one of the limitations of the permit issued was that it is "subject to all existing rights on the source." Presumably, appellant's proof will attempt to demonstrate this limitation by showing that the entire "stream system" mentioned in the 1952 agreement and the 1953 decree included the

underground source by being interdependent. This proof would not attack appellees' permits, as such, but would only demonstrate its limitations. If successful, appellants would be entitled to injunctive relief to prevent appellees from interfering with their prior existing rights on the source and the use of such water on lands not mentioned in the decree.

Finally, we do not accept the reliance placed by appellees and intervenor on three Nevada Supreme Court decisions. *Ruddell v. Sixth Judicial District Court,* 17 P.2d 693 (Nev. 1933); *Jahn v. Sixth Judicial District Court,* 73 P.2d 499 (Nev. 1937), and *In re Determination of Relative Rights: Franktown Creek Irr. Co. v. Marlette Lake Co.,* 364 P.2d 1069 (Nev. 1961). All three of these cases are distinguishable and inapplicable to the controversies in this appeal. In *Ruddell, supra,* the Nevada Supreme Court affirmed the binding and conclusive effect of the procedures similar to N.R.S. 533.090 *after* full adjudication of relative rights by the district court. No issue was presented as to the binding and conclusive effect of the statutorily separate application and permit procedures. *Jahn, supra,* is likewise distinguishable. The *Franktown* case, like *Ruddell* and *Jahn,* also involved the statutory procedure for determination of relative rights in a water source under N.R.S. 533.090. Nothing said in any of these cases lends itself to the conclusion that a mere permit issued by the State Engineer is a binding and conclusive determination of relative rights of water users with existing rights on the source. The failure to "protest" an

application or the effect thereof was not discussed or even mentioned in any of the three cases.

We do not believe that our holding does violence to Nevada's comprehensive water administration code nor the reliance which the Nevada legislature places upon the expertise of the office of the State Engineer. Indeed, state and federal district courts are invited to employ that expertise in water right determinations, *see* N.R.S. § 533.175, § 533.180 and § 533.240(4), regardless of which determination procedure is used, judicial or administrative. However, this reliance does not include the power to render final and conclusive determinations regarding the relative rights of water users.

Accordingly, the order of the district court, granting appellees' summary judgment motion, is REVERSED and REMANDED for further proceeding consisting with the views expressed herein.[14]

[14]We also note that the same result could be obtained by treating the grant of water permit as analogous to a default judgment. See *Cromwell v. County of Sac*, 94 U.S. 351, 356 (1877); RESTATEMENT OF JUDGMENTS (Second) § 68, Comment e (Tent. Draft No. 4, 1977); 1B MOORE'S FEDERAL PRACTICE, ¶ 0.444[1] at pp. 4002-4003 and ¶ 0.444[2] at p. 4006 (2nd Ed. 1948). However, we prefer to rest our disposition on the analysis of the Nevada statutory scheme set forth in the body of this opinion.

CONCURRING OPINION OF THE UNITED STATES COURT OF APPEALS UNDER DATE OF NOVEMBER 21, 1977

United States Court of Appeals
for the Ninth Circuit

No. 75-2462

Salmon River Canal Co., Ltd., a corporation,
Plaintiff-Appellant,
vs.
Bell Brand Ranches, Inc., etc., et al.,
Defendant-Appellees.

[Nov. 21, 1977]

Appeal from the United States District
Court for the District of Nevada

OPINION

SCHWARZER, District Judge, concurring:

I concur in the result but for different reasons. Although I have no quarrel with Judge Anderson's excellent opinion, I believe that it is an unnecessary intrusion into Nevada water law.

The question before the court is whether plaintiff's claim that defendants violated the 1953 decree could be determined on motion for summary judgment. Inasmuch as that claim involves (1) factual issues concerning the interpretation of the language of the

decree in the light of evidence of the intention of the parties, and (2) factual issues concerning the effect of defendants' taking of water on plaintiff's rights, it cannot be said that there are no genuine issues of material fact to be tried. If, upon remand, the trier of fact determines, as well it might, that the parties to the 1953 decree intended to allocate *all* of the available waters, including underground water although not expressly mentioned, then the defendants' taking of such water may violate the decree, regardless of whether it is done pursuant to subsequently issued Nevada permits. Those permits clearly cannot abrogate rights plaintiff may have acquired by reason of the 1953 decree. In those circumstances, therefore, the issue addressed in the court's opinion would not have to be reached.

While I agree that it is desirable for the appellate court to provide the lower court with guidance upon remand, there are compelling policy reasons against doing so in this case. The procedures governing appropriation of water are peculiarly creatures of state law. They are the product of years of political and legal conflict and represent a delicate compromise of claims to what, particularly in the Western states, is a scarce resource. Federal courts should be slow to intrude and risk disruption of state efforts to maintain coherent policies with respect to a matter of substantial public concern. *Cf., Colorado River Water Cons. District v. United States,* 424 U.S. 800, 814-816, 820 (1976). I can see no necessity for doing so in this case, at least at this time.

Appendix B

JUDGMENTS BELOW

I. IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA—ORDER GRANTING SUMMARY JUDGMENT—NOVEMBER 1, 1974

In the United States District Court
for the District of Nevada

Civil No. R-2523 BRT

Salmon River Canal Co., Ltd.,
a corporation,
Plaintiff,
vs.
Wayne L. Prim, Trustee, et al.,
Defendants.

[Nov. 1, 1974]

ORDER GRANTING SUMMARY JUDGMENT

Most of the pertinent facts have been related in the preliminary order filed June 27, 1974.

In connection with the 1952 action in this Court, the State Engineer of Nevada issued a formal Opinion and Order "that the waters of the Salmon River and its tributaries * * * are fully appropriated and no further permits will be granted for irrigation use on the stream system within the State of Nevada."

The uniqueness of the Salmon River Settlement Agreement and the 1952 decree lies in the fact that there was no limitation upon the amount of water permitted to be diverted. The limitation was with respect to the place and manner of use, and this was strictly limited. With respect to the Bridge Ranch, the limitation was "to beneficially irrigate 424 acres of land, more or less," which were particularly described.

The place of use of water is an important element of a water right under Nevada law.

> "533.040 Water used for beneficial purposes to remain appurtenant to place of use; exceptions. All water used in this state for beneficial purposes shall remain appurtenant to the place of use; provided:
>
> "1. That if for any reason it should at any time become impracticable to use water beneficially or economically at the place to which it is appurtenant, the right may be severed from such place of use and simultaneously transferred and become appurtenant to other place or places of use, in the manner provided in this chapter, and not otherwise, without losing priority of right heretofore established * * *." N.R.S. § 533.040(1).

The State Engineer is granted jurisdiction to entertain applications for permits to change "the manner of use or place or use of water already appropriated." N.R.S. 533.325. An application to appropriate water for irrigation must give the description of the lands to be irrigated. N.R.S. 533.340.

When an application to appropriate water is filed, notice is given by publication. Any interested person may file a written protest against the granting of the application. N.R.S. 533.365. Even in the absence of a protest, however, ***the State Engineer cannot grant an application where there is no unappropriated water in the source of supply.***

> "533.370 Approval, rejection of applications by state engineer; conditions; procedure; appropriation of waters of Colorado River. [Effective July 1, 1974.]
>
> " * * *
>
> "(4) Where there is no unappropriated water in the proposed source of supply, or where its proposed use or change conflicts with existing rights, or threatens to prove detrimental to the public interest, the state engineer shall reject the application and refuse to issue the permit asked for. * * *" N.R.S. 533.370(4).

A fortiori, the absence of unappropriated water in the source would be a valid basis for a written protest to the application.

In the present case, when the W. D. Ranching Company filed its applications for permits to appropriate water from an underground source which resulted in Permits Nos. 23135 and 24152, and notice was published, interested parties were given specific notice of at least two claims, (1) that there were unappropriated waters available for appropriation, and (2) that the applicant intended to use them to irrigate lands other than the 424 acres described in the Salmon River Settlement Agreement.

Thus, it is apparent that plaintiff's assertion in this case that it had no reason to and, indeed, no right to protest the W. D. Ranching Company applications is specious. The essence of plaintiff's present claim is that all the water of the Salmon River and its tributaries had already been appropriated and that the underground water appropriated by the two well permits was tributary to the stream system. These issues were directly before the state engineer in his servicing of the two applications to appropriate underground water inasmuch as he could not have granted them if there was no unappropriated water in the source of supply. He necessarily had to find that the underground source was not tributary to the stream system because he knew and, in fact, had specially declared in 1952 that the waters of the Salmon River and its tributaries are fully appropriated.

The Nevada water law constitutes a comprehensive and constitutional system for regulating the appropriation and use of the public waters of this State. *Humboldt Lovelock Irrigation Light & Power Co. v. Smith,* 25 F. Supp. 571 (D.C. Nev. 1938). Determinations by the state engineer made after full compliance with the lawful requirements for notice and hearing are final and binding. *Ruddell v. District Court,* 54 Nev. 363, 17 P. 2d 693 (1933). "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose." *United States v. Utah Construction Co.,* 384

U.S. 394, 422 (1966). See, also, 2 Am. Jur. 2d, "Administrative Law," §§ 496, 497, p. 305, et seq.

The concept of primary jurisdiction is also relevant. In this case, jurisdiction is predicated on diversity of citizenship. State law applies. Nevada has established a specialized agency for determinations of questions regarding the right to the appropriation and use of water. Courts should defer to the expertise of the agency in the first instance for a decision of such questions as whether there is unappropriated water in a source of supply or whether two claimed sources of supply are really a single source or in fact two different sources. Had plaintiff brought this action before the state engineer granted the two permits, Nos. 23135 and 24152, the Court would have been impelled to suspend or dismiss the action pending a decision by the state engineer in deference to the primary jurisdiction of that agency. Davis, Administrative Law Treatise, Vol. III, § 19.01; *Hewitt-Robins v. Freight-Ways,* 371 U.S. 84 (1962).

Inasmuch as the questions sought to be litigated have already been determined adversely to plaintiff's claims, summary judgment is proper.

IT HEREBY IS ORDERED that a summary judgment shall be entered dismissing the action.

Dated: November 1, 1974.

Bruce R. Thompson,
United States District Judge

II. IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA—JUDGMENT—NOVEMBER 1, 1974

In the United States District Court
for the District of Nevada

Civil No. R-2523 BRT

Salmon River Canal Co., Ltd.,
a corporation,
Plaintiff,
vs.
Wayne L. Prim, Trustee, et al.,
Defendants.

[November 1, 1974]

JUDGEMENT

In accordance with the provisions of the Order Granting Summary Judgment this day entered herein,

IT HEREBY IS ORDERED, ADJUDGED AND DECREED that the action entitled above be, and it hereby is, dismissed.

Dated: November 1, 1974.

Bruce R. Thompson
United States District Judge

III. IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA—FINDINGS OF FACT AND CONCLUSIONS OF LAW—MAY 15, 1975

In the United States District Court
for the District of Nevada

Civil No. R-2523 BRT

Salmon River Canal Co., Ltd.,
a corporation,
Plaintiff,
vs.
Bell Brand Ranches, Inc., et al.,
Defendants.

[May 15, 1975]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on before the Court on a motion for summary judgment by defendant Bell Brand Ranches, Inc., and the Court having examined the pleadings, affidavits and other supporting documents on file herein and being fully advised in the premises, finds the following material facts to be undisputed and states its conclusions of law as follows:

FINDINGS OF FACT

1. The parties hereto are the same as or successors in interest to the parties in the case of Salmon River

Canal Co., Ltd. v. Walter M. Gilmer, et al., Docket No. 913 in this Court.

2. A judgment was signed in said case on July 6, 1953 and filed on August 24, 1953.

3. Said judgment ratified and approved the Salmon River Settlement Agreement dated May 20, 1952.

4. The parties hereto or their predecessors in interest were all signatories to said Salmon River Settlement Agreement.

5. The aforementioned judgment adjudicated the rights of the parties to use water from the Salmon River and its tributaries.

6. Walter M. Gilmer and Bessie C. Gilmer, defendants in Docket No. 913, were predecessors in interest as to the water rights therein decreed in them to defendant Bell Brand Ranches, Inc. in the instant action.

7. Among the water rights decreed in the Gilmers by said judgment was the right to divert from tributaries of the Salmon River, without measurement, sufficient water to irrigate certain lands situate in Elko County, Nevada, specifically described in said judgment.

8. Said judgment enjoined the Gilmers from diverting water from the tributaries of the Salmon River water for irrigation of any lands not specifically described therein.

9. On June 21, 1967, an application was filed with the State Engineer of the State of Nevada on behalf

of the Gilmers for a permit to appropriate water from an underground source by means of a 700-foot deep well for irrigation use on Elko County lands not specifically described in the judgment in Docket No. 913.

10. Said application was returned for correction, and on August 21, 1967, a corrected application was filed.

11. Notice of the Gilmer application was duly published five times in a newspaper of general circulation in Elko County between August 31, 1967 and September 28, 1967.

12. At the time of said publications, a resident agent of plaintiff resided in Elko County.

13. No protests were filed against the granting of the application during the period provided for such protests by Nevada water law.

14. On September 25, 1968, the State Engineer approved the Gilmer application, granting Permit No. 23946.

15. The State Engineer had previously, on October 6, 1952, issued an opinion and order declaring that the waters of the Salmon River and its tributaries in Elko County had been fully appropriated and that no further permits would be granted for irrigation use on the stream system within the State of Nevada.

16. Plaintiff sought no judicial review of the State Engineer's act of granting Permit No. 23946 until its complaint was filed herein on July 16, 1971.

17. Water appropriated from the 700-foot deep irrigation well pursuant to Permit No. 23946 has been

used for irrigation purposes since the granting of said Permit.

18. The water rights granted by Permit No. 23946 were duly transferred to defendant Bell Brand Ranches, Inc. on August 29, 1972.

CONCLUSIONS OF LAW

1. The provisions of Nevada water law (Title 48, Nevada Revised Statutes, Chapters 532-544) authorizing protest against the granting of a permit to appropriate water and judicial review of the State Engineer's granting of such a permit are exclusive; i.e., compliance with the time limits and procedures set forth therein is a condition precedent to the obtaining of judicial relief from the act of the State Engineer in granting such a permit.

2. The provisions of Nevada water law regarding application for a permit to appropriate water, publication of notice of the application and granting of a permit were fully complied with in connection with Permit No. 23946 granted to the predecessors in interest of defendant Bell Brand Ranches, Inc.

3. The publication of notice of the application for Permit No. 23946 constituted notice to all interested parties that the applicant contended there were unappropriated waters available from the source specified and that the applicant intended to use them to irrigate Elko County lands other than those described in the judgment in Docket No. 913.

4. Plaintiff herein did not comply with the provisions of Nevada water law which authorized protest against the granting of Permit No. 23946 before it was granted and judicial review after it had been granted.

5. The act of the State Engineer in granting Permit No. 23946 necessarily rested upon his prior determination that the underground source of the water was not tributary to the stream system comprised of the Salmon River and its tributaries.

6. The instant action constitutes a collateral attack upon said determination of the State Engineer.

7. Said determination of the State Engineer is res judicata and not subject to collateral attack.

8. Construing the facts in the light most favorable to plaintiff herein, defendant Bell Brand Ranches, Inc. is entitled to a summary judgment in its favor as a matter of law.

Let judgment be entered accordingly.

Dated: May 15, 1975.

Bruce R. Thompson
United States District Judge

IV. IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA—ORDER GRANTING SUMMARY JUDGMENT—MAY 15, 1975

In the United States District Court
for the District of Nevada

Civil No. R-2523 BRT

Salmon River Canal Co., Ltd.,
a corporation,
Plaintiff,
vs.
Bell Brand Ranches, Inc., et al.,
Defendants.

[May 15, 1975]

ORDER GRANTING SUMMARY JUDGMENT

The sole remaining defendant, Bell Brand Ranches, Inc., has made a motion for summary judgment.

The undisputed facts in support of the motion are indistinguishable from those pertaining to an earlier motion filed by co-defendants J. K. Wheeler, an individual, and Wheeler Machinery Company, a corporation, a co-partnership, d/b/a W. D. Ranching Company, which led the Court, on November 1, 1974, to enter an order granting summary judgment.

Upon the grounds and for the reasons stated in the aforesaid order of November 1, 1974,

It Hereby Is Ordered that summary judgment shall be entered in favor of defendant Bell Brand Ranches, Inc.

Dated: May 15, 1975.

Bruce R. Thompson
United States District Judge

V. IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA—SUMMARY JUDGMENT—MAY 15, 1975

In the United States District Court
for the District of Nevada

Civil No. R-2523 BRT

Salmon River Canal Co., Ltd.,
a corporation,
Plaintiff,
vs.
Bell Brand Ranches, Inc., et al.,
Defendants.

[May 15, 1975]

SUMMARY JUDGMENT

This action having come on before the Court on the motion for summary judgment of defendant Bell Brand Ranches, Inc., and the Court having examined the file and being fully advised in the premises and having filed herein its Findings of Fact and Conclusions of Law and its Order Granting Summary Judgment,

It Hereby Is Ordered, Adjudged and Decreed that plaintiff take nothing by reason of its complaint and

that the action against defendant Bell Brand Ranches, Inc. be, and the same hereby is, dismissed.

Dated: May 15, 1975.

Bruce R. Thompson
United States District Judge

VI. IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA—ORDER DENYING PETITION FOR REHEARING—JANUARY 13, 1978

In the United States Court of Appeals
for the Ninth Circuit

Case No. 75-2462

Salmon River Canal Co., Ltd., a corporation,
Plaintiff-Appellant,

vs.

Bell Brand Ranches, Inc., a Nevada corporation, and J. K. Wheeler, an individual, and Wheeler Machinery Company, a corporation, a co-partnership, dba W. D. Ranching Co.,
Defendants-Appellees,

and

State of Nevada, ex rel. Roland D. Westergard, State Engineer,
Intervenor-Appellee.

[Jan. 13, 1978]

ORDER

Before: KILKENNY and ANDERSON, Circuit Judges, and SCHWARZER,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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*The Honorable William W. Schwarzer, United States District Judge, Northern District of California, sitting by designation.

Appendix C

STATUTES INVOLVED

533.030 Appropriation for beneficial use.

1. Subject to existing rights, all such water may be appropriated for beneficial use as provided in this chapter and not otherwise.

. . .

533.100 Investigation of flow of stream, ditches by state engineer; preparation of surveys, maps.

1. At the time set in the notice, the state engineer shall begin an investigation of the flow of the stream and of the ditches diverting water, and of the lands irrigated therefrom, and shall gather such other data and information as may be essential to the proper determination of the water rights in the stream.

. . .

533.360 Notice of application: Contents; publication.

1. When an application is filed in compliance with this chapter the state engineer shall, within 30 days, at the expense of the applicant, to be paid in advance as provided in this chapter, publish or cause to be published, in some newspaper having a general circulation and printed and published in the county where such water is sought to be appropriated, a notice of the application, which shall set forth:

(a) That the application has been filed.

(b) The date of the filing.

(c) The name and address of the applicant.

(d) The name of the source from which the appropriation is to be made.

(e) The location of the place of diversion.

(f) The purpose for which the water is to be appropriated.

The publisher shall add thereto the date of first publication and the date of last publication.

2. Upon proof of such publication, which must be filed within 30 days from the date of the last publication, the state engineer shall pay for the same from moneys deposited by the applicant for such purpose; but if the application is canceled for any reason before it is published, the fee of $25, collected for the publication, shall be returned by the state engineer to the applicant.

533.365 Interested person may file verified protest with state engineer against granting of application; notice to applicant of protest; hearings; technical rules of evidence do not apply.

1. Any person interested may, within 30 days from the date of last publication of the notice of application, file with the state engineer a written protest against the granting of the application, setting forth with reasonable certainty the grounds of such protest, which shall be verified by the affidavit of the protestant, his agent or attorney.

2. On receipt of a protest, the state engineer shall advise the applicant whose application has been pro-

tested of the fact that the protest has been filed with him, which advice shall be sent by registered or certified mail.

3. The state engineer shall duly consider the protest, and may, in his discretion, hold hearings and require the filing of such evidence as he may deem necessary to a full understanding of the rights involved; but no hearing thereon shall be had except after due notice by registered or certified mail to both the applicant and the protestant. The notice shall give the time and place at which the hearing is to be held and shall be mailed at least 15 days prior to the date set for the hearing.

4. The hearings shall be conducted under such rules and regulations as the state engineer may make, which he is hereby empowered to make, for the proper and orderly exercise of the powers conferred herein; but technical rules of evidence shall not be deemed to apply.

533.370 Approval, rejection of applications by state engineer; conditions; procedure; appropriation of waters of Colorado River.

1. Except as provided in subsections 2 and 6, the state engineer shall approve all applications made in proper form where all fees, as provided in this chapter, have been paid which contemplate the application of water to beneficial use, and where the proposed use or change does not tend to impair the value of existing rights, or to be otherwise detrimental to the public welfare.

2. Based upon the public interest and the economic welfare of the State of Nevada, the state engineer may in his discretion approve or disapprove any application of water to beneficial use or any application which contemplates a change in the place or beneficial use of water to a use involving the industrial purpose of generating energy to be exported out of this state.

. . .

4. Where there is no unappropriated water in the proposed source of supply, or where its proposed use or change conflicts with existing rights, or threatens to prove detrimental to the public interest, the state engineer shall reject the application and refuse to issue the permit asked for.

533.430 Permits, certificates of appropriation subject to existing rights.

1. Every permit to appropriate water, and every certificate of appropriation granted under any permit by the state engineer upon any stream or stream system which shall have been adjudicated under the provisions of NRS 533.090 to 533.235, inclusive, shall be, and the same is hereby declared to be, subject to existing rights and to the decree and modifications thereof entered in such adjudication proceedings, and the same shall be subject to regulation and control by the state engineer and the water commissioners in the same manner and to the same extent as rights which have been adjudicated and decreed under the provisions of this chapter. Every such holder of a certificate or a permit shall in like manner be sub-

ject to all of the provisions of NRS 533.270 to 533.305, inclusive, 533.465, 533.475, 533.480, 535.050 and 536.010 to 536.030, inclusive.

. . .

533.450 Orders, decisions of state engineer subject to judicial review: Procedure; appeals; appearance of attorney general.

1. Any person feeling himself aggrieved by any order or decision of the state engineer, acting in person or through his assistants or the water commissioner, affecting his interests, when such order or decision relates to the administration of determined rights or is made pursuant to NRS 533.270 to 533.445, inclusive, may have the same reviewed by a proceeding for that purpose, insofar as may be in the nature of an appeal, which shall be initiated in the proper court of the county in which the matters affected or a portion thereof are situated; but on stream systems where a decree of court has been entered, the action shall be initiated in the court that entered the decree. Such order or decision of the state engineer shall be and remain in full force and effect unless proceedings to review the same are commenced in the proper court within 30 days following the rendition of the order or decision in question and notice thereof is given to the state engineer as provided in subsection 3.

2. The proceedings in every case shall be heard by the court, and shall be informal and summary, but full opportunity to be heard shall be had before judgment is pronounced.

3. No such proceedings may be entertained unless notice thereof, containing a statement of the substance of the order or decision complained of, and of the manner in which the same injuriously affects the petitioner's interest, has been served upon the state engineer, personally or by registered or certified mail, at his office at the state capital within 30 days following the rendition of the order or decision in question. A similar notice shall also be served personally or by registered or certified mail upon the person or persons who may have been affected by such order or decision.

4. Where evidence has been filed with, or testimony taken before, the state engineer, a transcribed copy thereof, or of any specific part of the same, duly certified as a true and correct transcript in the manner provided by law, shall be received in evidence with the same effect as if the reporter were present and testified to the facts so certified. A copy of the transcript shall be furnished on demand, at actual cost, to any person affected by such order or decision, and to all other persons on payment of a reasonable amount therefor, to be fixed by the state engineer.

5. A bond shall not be required except when a stay is desired, and the proceedings provided for in this section are not a stay unless, within 5 days following the service of notice thereof, a bond is filed in an amount to be fixed by the court, with sureties satisfactory to such court, conditioned to perform the judgment rendered in such proceedings.

6. Costs shall be paid as in civil cases brought in the district court, except by the state engineer or the state.

7. The practice in civil cases applies to the informal and summary character of such proceedings, as provided in this section.

8. Appeals may be taken to the supreme court from the judgment of the district court in the same manner as in other civil cases.

9. The decision of the state engineer shall be prima facie correct, and the burden of proof shall be upon the party attacking the same.

10. Whenever it appears to the state engineer that any litigation, whether now pending or hereafter brought, may adversely affect the rights of the public in water, he shall request the attorney general to appear and protect the interests of the state.

534.020 Underground waters belong to public; subject to appropriation for beneficial use; declaration of legislative intent.

1. All underground waters within the boundaries of the state belong to the public, and subject to all existing rights to the use thereof, are subject to appropriation for beneficial use only under the laws of this state relating to the appropriation and use of water and not otherwise.

. . .

534.100 Recognition of existing water rights; classification of water in definable aquifer or percolating water by state engineer; adjudication of vested underground water rights.

1. Existing water rights to the use of underground water are hereby recognized. For the purpose of this chapter a vested right is a water right on underground water acquired from an artesian or definable aquifer prior to March 22, 1913, and an underground water right on percolating water, the course and boundaries of which are incapable of determination, acquired prior to March 25, 1939. The distinction as to whether water is in a definable aquifer or whether it is percolating water, the course and boundaries of which are incapable of determination, is a matter to be determined by the state engineer.

. . .

Appendix D

PORTIONS OF THE RECORD BELOW

In the United States District Court
for the District of Nevada

No. R2523

Salmon River Canal Co., Ltd.,
a corporation,
Plaintiff,

vs.

Wayne L. Primm, Trustee under that certain Revised Trust Agreement dated July 5, 1967; and J. K. Wheeler, an individual and Wheeler Machinery Company, a corporation, a Co-Partnership, dba WD Ranching Co.,
Defendants,

and

State of Nevada, ex rel. Roland D. Westergard, State Engineer,
Applicant in Intervention.

[Jan. 14, 1972]

ANSWER OF STATE OF NEVADA EX REL. ROLAND D. WESTERGARD, STATE ENGINEER

I

In answer to the allegations of paragraph I of the Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth thereof and therefore denies the same.

II

In answer to the allegations of paragraph II of the Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth thereof and therefore denies the same.

III

In answer to the allegations of paragraph III, Defendant admits the execution of the Salmon River settlement agreement, and further admits that on the date stated this court entered judgment confirming and ratifying the said settlement agreement, but as to the other remaining matters alleged therein, Defendant is without knowledge or information sufficient to form a belief as to the truth thereof and therefore denies the same.

IV

Defendant admits the allegations of paragraph IV, save and except Defendant denies that any agreement was made or any judgment entered which would preclude appropriation of waters other than those specified in the agreement and judgment or from irrigating the specified lands or other lands with other waters than those specified.

V

In answer to the allegations of paragraph V of the Complaint, Defendant is without knowledge or infor-

mation sufficient to form a belief as to the truth thereof and therefore denies the same.

VI

In answer to the allegations of paragraph VI of the Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth thereof and therefore denies the same.

VII

In answer to paragraph VII, Defendant admits the drilling of a well, but is without knowledge or information sufficient to form a belief as to the truth thereof and therefore denies the same.

VIII

In answer to the allegations of paragraph VIII, Defendant admits the drilling of the wells as alleged, but as to the remaining allegations contained therein, Defendant is without information sufficient to form a belief as to the truth thereof and therefore denies the same.

IX

Denies the allegations of paragraph IX.

X

In answer to the allegations of Paragraph X of the Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth thereof and therefore denies the same.

Wherefore, Defendant In Intervention prays that Plaintiff be granted no relief under its Complaint herein.

Dated November 5, 1971.

Robert List
Attorney General
and
L. William Paul
Deputy Attorney General
By L. William Paul
L. William Paul
Attorneys for
Applicant in Intervention
Nye Building, Room 216
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SALMON RIVER SETTLEMENT AGREEMENT

THIS AGREEMENT, made this 20th day of May, 1952, by and between the Salmon River Canal Company, Ltd., a corporation, organized under the laws of Idaho, and authorized to do business in the States of Idaho and Nevada, hereinafter referred to as the "Canal Company" and Oren F. Boies and Esther Teresa Boies, his wife; Eyer H. Boies and Marla Marie Boies, his wife; June Agee; Horace Agee and Esther A. Agee, his wife; H. Vance Agee and Dorothy L. Agee, his wife; Robert J. Agee and Thelma Agee, his wife; Lester Agee and Dorothy Agee, his wife; J. J. Strode and Nevada Strode, his wife; Roscoe N. Nelson and Alva V. Nelson, his wife; Walter M. Gilmer and Bessie Gilmer, his wife, hereinafter collectively for brevity called "Nevada Land Owners", all residents of Elko County, Nevada.

WITNESSETH:

1. WHEREAS, the Canal Company is the owner of license and water right certificate No. 2859 for 1,250 c.f.s. of the water of the Salmon River, with priority of December 29, 1906; and license and water right certificate No. 3267 for 500 c.f.s. with priority of August 22, 1907; and license and water certificate No. 5519 for 1,000 c.f.s. of the waters of the Salmon River, with priority of September 7, 1909, issued by the Commissioner of Reclamation of the State of Idaho, after due compliance by the Canal Company and its predecessors in interest, with the laws of the State of Idaho, for the irrigation of lands in certain legal subdivisions in Twin Falls County, State of

Idaho, covering a gross acreage of 30,265.33 acres; and

2. WHEREAS, for the purpose of having its rights adjudicated in the Salmon River, the Canal Company on the 20th day of May, 1912, instituted a proceeding entitled *Twin Falls Salmon River Land and Water Company, a corporation, and Salmon River Canal Company Limited, a corporation* vs. *Vineyard Land and Stock Company, a corporation,* in the District of the United States for the District of Idaho, Southern Division, No. 405, pursuant to which there was entered on the 23rd day of March, 1916, a decree adjudicating the water rights in the Salmon River as between the litigants, which is by reference made a part hereof for the purpose of and to the extent necessary to clarify the terms and provisions of this agreement, which is hereinafter called the "Federal Decree" and in which the following water rights were awarded:

(a) There was decreed to Vineyard Land and Stock Company a prior right of 12,500 acre feet of water of said stream to be appurtenant to certain lands in said decree described.

(b) There was decreed to Canal Company, subject to the above mentioned prior right, the waters of said stream and its tributaries at the rate of 1500 cubic feet per second under Permit No. 2659 issued by the State Engineer of the State of Idaho; said right dating from December 29, 1906, and further to use 500 cubic feet per second of the waters of said

stream under Permit No. 3267 issued by the State Engineer of the State of Idaho, said right dating from August 22, 1907; and further the right to use 1000 cubic feet per second of the waters of said stream under Permit No. 5519, issued by the State Engineer of the State of Idaho, said right dating from September 7, 1909; provided, however, that the maximum aggregate diversion by the Canal Company for any one irrigating season should not exceed 235,000 acre feet, the same to be measured at the outlet of the Canal Company's reservoir at or immediately above what is known as the Salmon River Dam.

(c) There was likewise awarded to the Vineyard Land and Stock Company a tertiary right of 12,000 acre feet of other waters of the Salmon River and its tributaries, subordinate to the right last mentioned, for the use on lands of said Company described in said Decree.

AND WHEREAS, also the State Engineer of the State of Nevada did heretofore make and find a certain Order of Determination in conformity with the statutes of said State which said Order was thereafter confirmed, as therein amended, in certain proceedings entitled, "In the Matter of the Determination of the Relative Rights in and to the Waters of Salmon River and its Tributaries", in the District Court of the Fourth Judicial District of the State of Nevada in and for the County of Elko, the decree being entered on March 3, 1923, and which said Decree is hereafter referred to herein as "Nevada State Court Decree", and which said Decree awarded

water rights for the land hereinafter described and which are affected by this agreement.

3. WHEREAS, thereafter by meane conveyances all of the lands formerly owned by Vineyard Land and Stock Company in Elko, Nevada, and to which water rights had been decreed in the last mentioned decree, were conveyed to Wilkins & Wunderlich, a co-partnership doing business as the U. C. Land and Cattle Company; that thereafter certain of the lands to which water rights had been awarded by said decree, being those commonly known as the Hubbard and Vineyard Ranches, and being those hereinafter described in Exhibit B hereto attached, were conveyed, together with the water rights described in Paragraph 6 hereof, to certain of the Nevada Land owners as hereinafter set out; and certain of the other of said lands to which water rights had been decreed, being the lands commonly known as the Bridge Ranch, and being the lands described in Paragraph 7 hereof, were conveyed, together with the water right described in said paragraph, to certain of the other Nevada land owners; and that all of the remaining lands to which waters were awarded in said decree and all of the other water rights awarded by said Federal Court Decree or in any manner appurtenant to or belonging to said lands have been conveyed to Canal Company, either by direct or meane conveyances from Wilkins & Wunderlich; and that the Canal Company is now the owner of all the water rights awarded by said decree other than those specifically conveyed to and owned by the

Nevada land owners who own the Hubbard, Vineyard and Bridge ranches as hereinafter specifically described.

4. WHEREAS, the Canal Company received, by conveyance dated May 24, 1947, title to, and is now the owner of, and is the successor in interest to Vineyard Land and Stock Company in those certain lands in Elko County, Nevada which are more fully described on the list hereto attached, marked Exhibit A and by reference made a part hereof; and likewise received conveyance of, and is now the successor in interest to Vineyard Land and Stock Company in, and the owner of, all of the water rights awarded to said last mentioned lands by said Federal Court Decree, the Nevada State Court Decree, the laws of Nevada or otherwise (other than those portions of said water rights which are owned by the Nevada land owners as elsewhere herein set out) the specific description of said water rights now owned by and conveyed to the Canal Company being:

> "All water, water rights, rights to the use of water, dams, ditches, canals, reservoirs, pipes, pipelines and other means for the diversion and/or use of water appurtenant to and/or now or heretofore used or enjoyed in connection with said land, or any part thereof, including but without limitation thereto, 8,000.87 acre feet of water annually out of the aggregate rights decreed and adjudicated" in said decree.

5. WHEREAS, the Canal Company did on May 4, 1949, in conformity with the statutes of the State of Nevada, file with the said Engineer of said State, eight

applications to transfer all of the waters which had been awarded by Nevada State Court Decree to the lands in Elko County, Nevada, which had been conveyed to Canal Company and which are described in Exhibit A hereto attached (except only limited rights from Knoll Creek, Warm Springs Creek, and Trout Creek) by applications Nos. 12888 to 12895, inclusive; which applications are now pending in the office of the State Engineer of the State of Nevada; said applications being to transfer the said waters to, and for use upon those lands situated in the State of Idaho which comprise the irrigation project owned and operated by Company and which is commonly known as the Salmon River Canal Company Irrigation Project; and the Canal Company has, pending final determination of said applications, been beneficially using said waters on said Idaho lands continuously since the year 1947, comprising a gross area of approximately 35,000 acres.

6. WHEREAS, Oren F. Boies and Esther Teresa Boies, his wife; Eyer H. Boies and Marla Marie Boies, his wife; and June Agee are now the owners of those lands described in Exhibit B hereto attached and which are commonly known as The Hubbard and Vineyard Ranches and of the water rights thereto appurtenant; that the deed conveying said lands to said parties conveyed the water right appurtenant thereto in the following language and subject to the following restrictions:

> "Together with all water, water rights, rights to the use of water, dams, ditches, canals, reservoirs, pipes, pipe lines and any other means for

the diversion and/or use of water appurtenant to and/or now or heretofore used or enjoyed in connection with said land, or any part thereof, including, but without limitation thereto, 2360.13 acre feet of water annually out of the aggregate rights decreed and adjudicated to the predecessors of the grantors in the District Court of the United States in and for the District of Idaho; Southern Division, entitled 'Twin Falls Salmon River Land and Water Company, a corporation, and Salmon River Canal Company, Limited, a corporation, plaintiffs, vs. Vineyard Land and Stock Company, a corporation, Defendant, and Utah Construction Company, successor in interest to the defendant Vineyard Land and Stock Company, a Corporation, Defendant, No. 405' as modified by subsequent decisions and orders in said cause, and as modified on appeal to the Circuit Court of Appeals, Ninth Circuit (85 Fed. 2nd 789) and in addition thereto the right to continue to permit portions of said lands to be flooded by the spring run-off and overflow and surplus waters of certain tributaries to Salmon River to the extent and in the manner as defined by said United States Circuit Court of Appeals; * * * provided, however, that none of the language used foregoing, whether general or otherwise, shall in any way give grantees the right to any more than 2360.13 acre feet out of the decreed rights above described, * * *";

7. WHEREAS, Roscoe N. Nelson and Alva V. Nelson, his wife and J. J. Strode and Nevada Strode, his wife, are now the owners as successors in interest by mesne conveyances from the Vineyard Land and Stock

Company of a portion of the lands which were awarded water rights by said Federal Court Decree and said Nevada State Court Decree, being those lands commonly known as the Bridge Ranch, and which are more particularly described as follows, to-wit:

T. 47 N., R. 64 E., M. D. B. & M.

Sec. 13: SE¼, S½SW¼, NE¼SW¼
23: N½NE¼
24: N½N½

T. 47 N., R. 65 E., M. D. B. & M.

Sec. 10: SE¼SE¼
11: SW¼SW¼
15: S½SW¼, NE¼SW¼, SE¼NW¼, N½NE¼
16: S½SW¼, SW¼SE¼
17: SW¼, S½NW¼, S½SE¼
18: Lots 2, 3, 4; E½SW¼, SE¼NW¼, S½NE¼, N½SE¼, SE¼SE¼
21: N½N½
22: NW¼NW¼

T. 47 N., R. 66 E., M. D. B. & M.

Sec. 3: Lot 4
4: Lot 1
12: NW¼NE¼, S½NW¼, NW¼SW¼
22: W½NW¼
24: SE¼NE¼

T. 47 N., R. 67 E., M. D. B. & M.

Sec. 6: Lots 1, 2, 3

The water rights appurtenant to said lands were conveyed in the following language and subject to conditions and restrictions therein stated as follows:

> "Together with all water, water rights, rights to the use of water, dams, ditches, canals, reservoirs, pipes, pipe lines and any other means for the diversion and/or use of water appurtenant to and/or now or heretofore used or enjoyed in connection with said land, or any part thereof, including, but without limitation thereto, 892.96 acre feet of water annually out of the aggregate rights decreed and adjudicated to the predecessors of the first parties in the District Court of the United States in and for the District of Idaho, Southern Division, entitled 'Twin Falls Salmon River Land and Water Company, a corporation, and Salmon River Canal Company, Limited, a corporation, Plaintiffs, vs. Vineyard Land and Stock Company, a corporation, Defendant, and Utah Construction Company, successor in interest to the defendant Vineyard Land and Stock Company, a corporation, Defendant, No. 405' as modified by subsequent decisions and orders in said cause, and as modified on appeal to the Circuit Court of Appeals, Ninth Circuit (85 Fed. 2nd, 769) and in addition thereto the right to continue to permit portions of said lands to be flooded by the spring run-off and overflow and surplus waters of certain tributaries to Salmon River to the extent and in the manner as defined by said United States Circuit Court of Appeals; * * * provided, however, that none of the language used foregoing, whether general or otherwise, shall in any way give second party the right to any more than 892.96 acre feet out of the decreed rights above described * * *";

8. WHEREAS, Horace Agee and Esther A. Agee, his wife and H. Vance Agee and Dorothy L. Agee, his wife, are now the owners of those lands in Elko County, Nevada, described in Exhibit C hereto, commonly known as the Home Ranch, to which certain water rights from the Salmon River, Cottonwood Creek, Canon Creek and Polo Creek, tributaries of the Salmon River are appurtenant as more particularly described in the Nevada State Court Decree and for which lands certain other water rights are claimed to be appurtenant from Cottonwood Creek under Permit No. 1687, Certificate No. 329, issued on May 12, 1917, by the State Engineer of Nevada and for which certain other water rights are sought under Applications Nos. 11984, 11985 and 11986, filed with State Engineer of Nevada on August 26, 1947 and which are now pending before said State Engineer, and

9. WHEREAS, Robert J. Agee and Thelma Agee, his wife, are now the owners of those lands in Elko County, Nevada, described in Exhibit D hereto, known as the Robert Agee Ranch, to which certain water rights from the Salmon River and from the North Fork of the Salmon River are appurtenant, as more particularly described in said Nevada State Court Decree; and for which lands certain other water rights are sought from the North Fork of the Salmon River under Applications Nos. 11978 and 11979, filed with the State Engineer of Nevada on August 26, 1947; and which are now pending before said State Engineer, and

10. WHEREAS, Lester Agee and Dorothy Agee, his wife, are now the owners of those lands in Elko County, Nevada, described in Exhibit E hereto known as the Lester Agee Ranch, to which certain water rights from Willow Creek, and Wilson Creek are appurtenant, as more particularly described in said Nevada State Court Decree and for which lands certain other water rights are claimed to be appurtenant from Shack Creek under Permit No. 1659, Certificate No. 365, issued by the State Engineer of Nevada, on December 16, 1918, and from Schell Creek under Permit No. 2709, Certificate No. 912, issued December 17, 1923, by the State Engineer of Nevada; and

11. WHEREAS, Walter M. Gilmer and Bessie C. Gilmer, his wife, are now the owners of those lands in Elko County, Nevada, described in Exhibit F, known as the Gilmer Ranch, to which certain water rights from Sun Creek, Deer Creek and Camp Creek, tributaries of the Salmon River are appurtenant, as more particularly described in said State Court Decree; and for which lands certain other water rights are claimed to be appurtenant from Sun Creek under Permit No. 2085, issued by the State Engineer of Nevada, on June 10, 1912, Permit No. 2313, issued by the State Engineer of Nevada on April 21, 1913, Permit No. 2314, issued by the State Engineer of Nevada on April 21, 1913, Permit No. 2575 issued by the State Engineer of Nevada on April 21, 1913; and for which lands certain water rights are claimed to be appurtenant from Camp Creek under Permit No.

1884, Certificate No. 135, issued December 22, 1913; Permit No. 1885, Certificate No. 246, issued December 12, 1914; Permit No. 1884, Certificate No. 247, issued December 12, 1914; Permit No. 1885, Certificate No. 248, issued December 12, 1914; Permit No. 1886, Certificate No. 249, issued December 12, 1914; and for which certain other water rights are sought under Applications Nos. 11980, 11981, 11982 and 11983, filed with the State Engineer of Nevada on August 26, 1947, and which are still pending before said State Engineer; and

12. WHEREAS, certain differences have arisen between the Canal Company and the Nevada Land Owners regarding the use of waters of the Salmon River and its tributaries and the extent of the rights of each of the parties to the use of the waters of the Salmon River and its tributaries; and

13. WHEREAS, there is pending in the United States District Court for the District of Nevada, an action No. 913, entitled *Salmon River Canal Company, Ltd., a corporation,* vs. *Walter Gilmer, et al.* in which the Canal Company is plaintiff and most of the above named parties are defendants, in which the plaintiff asks that the respective claims and demands to the use of the waters of the Salmon River and its tributaries, be quieted and determined against the rights of the defendants; and

14. WHEREAS, the parties in order to settle and compose their differences, and to avoid extended and expensive litigation, desire to enter into a settlement agreement as to the use of the waters of the Salmon

River, and its tributaries, in the States of Nevada and Idaho, between and among the parties hereto, and which they may desire to use as the basis for a stipulated decree to be entered in said action entitled *Salmon River Canal Co., Ltd., a corporation,* vs. *Walter M. Gilmer, et al.,* or in an action which may be filed in the District Court for the Fourth Judicial District of the State of Nevada in and for the County of Elko, (the forum for the entry of said stipulated decree to be selected by the Canal Company), and also as a basis for the action to be taken on pending applications before the State Engineer of Nevada.

NOW, THEREFORE, in consideration of the mutual promises and covenants hereinafter set forth, the parties hereto agree as follows:

15. VINEYARD RANCH

(a) Oren F. Boies and Esther Teresa Boies, his wife, Eyer H. Boies and Marla Marie Boies, his wife; and June Agee, hereinafter referred to as the owners of the Vineyard Ranch and their heirs, successors and assigns, are acknowledged to be the owners of, to have the right to use, and shall be entitled to annually divert from Jake's Creek and the Salmon River through the Tunnel and Vineyard ditches, without measurement thereof, sufficient water for domestic use, for stock water use on the lands hereinafter described and to beneficially irrigate Nine hundred forty-two (942) acres of land more or less, more particularly described on those two pages marked Exhibit C and headed "Vineyard Ranch" hereto attached, and by reference made a part hereof. Said owners agree not to appropriate any of the waters of the Salmon River or its tributaries for any other lands than those hereinabove specifically described, and agree to confine the use of the waters of said streams to the lands described in Exhibit G hereto attached, and particularly agree to accept the waters herein provided for use on the said specific acreage and no other as provided in this Agreement in full satisfaction of any and all rights in and to the waters of the Salmon River and its tributaries which they have or might claim under either said Federal Court Decree, said Nevada State Court Decree, under the laws of the State of Nevada, or otherwise; and further agree not to take any steps by means of applications for change of points of diversion or places of use or otherwise, to use said water on any other or different lands other than those described in Exhibit G hereto; and that there shall be no irrigation on said lands after September 1 of each calendar year.

(b) It is understood, that the above described acreage was established by the survey made in 1951 under the supervision of W. H. Settlemeyer, Licensed State Water Rights Surveyor, by John E. Hayes, as shown on that certain map dated April 7, 1952, designated "Vineyard Ranch", and on file in the office of the State Engineer of Nevada. Said map is hereby expressly approved by the owners of the Vineyard Ranch and the Canal Company, and by reference made a part hereof, and by the State Engineer of Nevada by his approval of this agreement.

(c) The owners of Vineyard Ranch agree to withdraw Application No. 12412 filed with the State Engineer of Nevada on April 12, 1948, by Albert H. Agee to appropriate 0.47 c.f.s. of the waters of the Salmon River and Application No. 11967 filed on August 26, 1947, by Oren F. Boies, Albert Agee and H. V. Agee to appropriate 4.93 c.f.s. of the waters of the Salmon River.

Said owners agree not to appropriate any of the waters of the Salmon River or its tributaries for any other lands than those hereinabove specifically described, and agree to confine the use of the waters of said streams to the lands described in Exhibit G hereto attached, and particularly agree to accept the waters herein provided for use on the said specific acreage, and no other, as provided in this Agreement in full satisfaction of any and all rights in and to the waters of the Salmon River and its tributaries which they have or might claim under either said Federal Court Decree, said Nevada State Court Decree, under the laws of the State of Nevada, or otherwise; and further agree not to take any steps by means of applications for change of points of diversion or places of use, or otherwise, to use said water on any other or different lands other than those described in Exhibit G hereto; and that there shall be no irrigation on said lands after September 1 of each calendar year.

(d) The Canal Company shall have the right, from time to time and as often as it desires, to dredge and straighten the channel of the Salmon River starting

at the point where the Salmon River leaves the north end of the Vineyard Ranch and continuing as far upstream on said ranch as the Canal Company at any time deems necessary or appropriate; provided; however, that the Canal Company shall take all necessary steps to prevent the channel from becoming unreasonably or unnecessarily deep, and the Canal Company further agrees that it shall be its responsibility, in connection with any channel changes, to replace or repair any existing diversion structures which may be destroyed or injured by the Canal Company's operations. The Canal Company also shall have the right, from time to time and as often as it desires to drain swamp areas and springs on the Vineyard Ranch and to dredge channels therefrom to the Salmon River, it being understood that in doing such work, it shall take all reasonable steps and precautions to see that it does not unreasonably interfere with the use of said land for its usual purpose. It is understood and agreed that the owners of the Vineyard Ranch shall be permitted to irrigate those swamp areas or sub-irrigated lands which may be drained or dried up by the Canal Company's future activities, and which lands are within the above described acreage. The owners of the Vineyard Ranch shall have the right to install a new diversion dam and ditches to irrigate lands lying on the westerly and northerly side of the Salmon River which are now sub-irrigated, in the event said owners find it necessary to do so to irrigate areas which are now sub-irrigated, provided, however, that such new diversion dam shall be so designed and constructed that it shall allow the flow of the stream

to pass unimpeded (except only as it may be needed to be checked to permit such diversion) and the plans and designs of such dam shall be subject to the prior approval of the Canal Company, and in conformity with the laws of Nevada relating to dams.

16. HUBBARD RANCH

(a) Oren F. Boies and Esther Teresa Boies, his wife, Eyer H. Boies and Marla Marie Boies, his wife, and June Agee, hereinafter referred to as the Owners of the Hubbard Ranch and their heirs, successors and assigns, are acknowledged to be the owners of, to have the right to use, and shall be entitled to annually divert from Willow or Dry Creek and Jake's Creek, sufficient water for domestic use, for stock water use on the lands hereinafter described, and to beneficially irrigate 970 acres of land more or less, more particularly decribed on those two pages marked Exhibit H and headed "Hubbard Ranch" hereto attached, and by reference made a part hereof.

(b) It is understood, that the above described acreage was established by the survey made in 1951 under the supervision of W. H. Settlemeyer, Licensed State Water Rights Surveyor, by John E. Hayes, as shown on that certain map dated April 7, 1952, designated "Hubbard Ranch", and on file in the office of the State Engineer of Nevada. Said map is hereby expressly approved by the owners of the Hubbard Ranch and the Canal Company, and by reference made a part hereof, and by the State Engineer of Nevada by his approval of this agreement.

(c) The owners of the Hubbard Ranch agree to withdraw application No. 12411 filed on April 12, 1948, by Albert H. Agee with the State Engineer of Nevada to appropriate 3 c.f.s. of the waters of Willow or Dry Creek and Application No. 11988 filed on August 26, 1947, by Oren F. Boies, Albert H. Agee and H. V. Agee to appropriate 6.16 c.f.s. of the waters of Willow or Dry Creek.

(d) Said owners agree not to appropriate any of the waters of the Salmon River or its tributaries for any other lands than those hereinabove specifically described, and agree to confine the use of the waters of said streams to the lands described in Exhibit H hereto attached, and particularly agree to accept the waters herein provided for use on the said specific acreage and no other as provided in this agreement in full satisfaction of any and all rights in and to the waters of the Salmon River and its tributaries which they have or might claim under either said Federal Court Decree, said Nevada State Court Decree, under the laws of the State of Nevada, or otherwise; and further agree not to take any steps by means of applications for change of points of diversion or places of use, or otherwise, to use said water on any other or different lands other than those described in Exhibit H hereto; and that there shall be no irrigation on said lands after September 1 of each calendar year.

(e) The Canal Company agrees not to object to the application of the owners of the Hubbard Ranch to construct a reservoir off Jake's Creek in Section 16, Township 43 N, Range 63 E. if the pending ap-

plication is so amended to provide for a maximum capacity of not to exceed 500 acre feet and to provide that diversion into the reservoir shall be restricted to the period from September 1 to April 1 in any winter, and that no water shall be diverted into said reservoir at any other time; and the owners of the Hubbard Ranch agree to so amend the pending application for such reservoir and not to make any applications for any other or different reservoirs.

17. BRIDGE RANCH

(a) J. J. Strode and Nevada Strode, his wife, Roscoe N. Nelson and Alva V. Nelson, his wife, hereinafter referred to as the owners of the Bridge Ranch, and their heirs, successors and assigns, are acknowledged to be the owners of, to have the right to use, and shall be entitled to annually divert from Shoshone Creek without measurement thereof, sufficient water for domestic use, for stock water use on the lands hereinafter described and to beneficially irrigate 424 acres of land, more or less, more particularly described on that page marked Exhibit I, and headed "Bridge Ranch" and by reference made a part hereof.

(b) It is understood that the above described acreage was established by the survey made in 1951 under the supervision of W. H. Settlemeyer, Licensed State Water Rights Surveyor, by John E. Hayes, as shown on that certain map dated April 7, 1952, designated "Bridge Ranch" and on file in the office of the State Engineer of Nevada. Said map is expressly approved

by the owners of the Bridge Ranch and the Canal Company, and by reference made a part hereof and by the State Engineer of Nevada by his approval of this agreement.

(c) The Canal Company shall have the right, from time to time and as often as it desires, to dredge and straighten the channel of Shoshone Creek starting at the point where Shoshone Creek leaves the west end of the Bridge Ranch and continuing as far upstream as the Canal Company at any time deems necessary and appropriate; provided, however, that the Canal Company shall take all necessary steps to prevent the channel from becoming unreasonably or unnecessarily deep, and the Canal Company further agrees that it shall be its responsibility, in connection with any channel changes to replace or repair any existing diversion structures which may be destroyed or injured by the Canal Company's operations. The Canal Company also shall have the right from time to time, and as often as it may desire, to drain swamp areas and springs on the Bridge Ranch and to dredge channels therefrom to Shoshone Creek.

(d) Said owners agree not to appropriate any of the waters of the Salmon River or its tributaries for any other lands than those hereinabove specifically described, and agree to confine the use of the waters of said streams to the lands described in Exhibit I hereto attached, and particularly agree to accept the waters herein provided for use on the said specific acreage and no other, as provided in this agreement in full satisfaction of any and all rights in and to the

waters of the Salmon River and its tributaries which they have or might claim under either said Federal Court Decree, said Nevada State Court Decree, under the laws of the State of Nevada, or otherwise; and further agree not to take any steps by means of applications, for change of points of diversion or place or use, or otherwise, to use said water on any other or different lands other than those described in Exhibit I hereto; and there shall be no irrigation on said lands after September 1 of each calendar year.

18. THE HOME RANCH

(a) Horace Agee and Esther A. Agee, his wife, H. Vance Agee and Dorothy L. Agee, his wife hereinafter referred to as the Owners of Home Ranch and their heirs, successors and assigns, are acknowledged to be the owners of, to have the right to use, and shall be entitled to annually divert from Cottonwood Creek without measurement thereof, sufficient water for domestic use, for stock water use on the lands hereinafter described and to beneficially irrigate 500 acres of land, more or less, more particularly described on that page marked Exhibit J, and headed "Cottonwood Ranch" and by reference made a part hereof.

(b) It is understood that the above described acreage was established by the survey made in 1951 under the supervision of W. H. Settlemeyer, Licensed State Water Rights Surveyor, by John E. Hayes, as shown on that certain map dated April 7, 1952, designated "Cottonwood Ranch", and on file in the office of the State Engineer of Nevada. Said map is hereby ex-

pressly approved by the owners of the Home Ranch and the Canal Company, and by reference made a part hereof and by the State Engineer of Nevada by his approval of this agreement.

(c) Horace Agee and Esther A. Agee, his wife, H. Vance Agee and Dorothy L. Agee, his wife, hereinafter referred to as the owners of Home Ranch and their heirs, successors and assigns, are acknowledged to be the owners of, to have the right to use, and shall be entitled to annually divert from Canyon Creek, Pole Creek, Lime Creek, and the Salmon River without measurement thereof, sufficient water for domestic use, for stock water use on the lands hereinafter described and to beneficially irrigate 1,022 acres of land, more or less, more particularly described on that page marked Exhibit K, and headed "Agee's Canyon Creek" and by reference made a part hereof.

(d) It is understood that the above described acreage (except for approximately 100 acres on Lime Creek in Section 36, T. 47 N., R. 61 E., MDB&M) was established by the survey made in 1951 under the supervision of W. H. Settlemeyer, Licensed State Water Rights Surveyor, by John E. Hayes, as shown on that certain map dated April 7, 1952, designated "Agee Home Ranch or Canyon Creek", and on file in the office of the State Engineer of Nevada. Said map is hereby expressly approved by the owners of the Home Ranch and the Canal Company and by reference made a part hereof, and by the State Engineer of Nevada by his approval of this agreement.

(e) The owners of the Home Ranch agree to withdraw applications Nos. 11984, 11985 and 11986, filed with the State Engineer of Nevada on August 26, 1947, by Esther Teresa Boies to appropriate 3.99 c.f.s. of the waters of Cottonwood Creek and said owners agree to conform, by appropriate amendment, in a manner acceptable to the State Engineer of Nevada, existing permits and certificates to the acreage described above.

(f) Said owners agree not to appropriate any of the waters of the Salmon River or its tributaries for any other lands than those hereinabove specifically described, and agree to confine the use of the waters of said streams to the lands described in Exhibits J and K respectively hereto attached, and particularly agree to accept the waters herein provided for use on the said specific acreage and no other, as provided in this agreement in full satisfaction of any and all rights in and to the waters of the Salmon River and its tributaries which they have or might claim under either said Federal Court Decree, said Nevada Court Decree, under the laws of the State of Nevada, or otherwise; and further agree not to take any steps by means of applications for change of points of diversion or place of use, or otherwise, to use said water on any other or different lands other than those described in Exhibits J and K respectively hereto attached.

10. ROBERT J. AGEE RANCH

(a) Robert J. Agee and Thelma Agee, his wife, hereinafter referred to as the Owners of Robert J.

Agee Ranch and their heirs, successors and assigns, are acknowledged to be the owners of, to have the right to use, and shall be entitled to annually divert from Salmon River and the North Fork of the Salmon River without measurement thereof, sufficient water for domestic use, for stock water use on the lands hereinafter described and to beneficially irrigate 612 acres of land, more or less, more particularly described on those three pages marked Exhibit L, and headed "R. J. Agee Home Tract, Calf Pasture, and Upper Ranch," and by reference made a part hereof.

(b) It is understood that the above described acreage was established by the survey made in 1951 under the supervision of W. H. Settlemeyer, Licensed State Water Rights Surveyor, by John E. Hayes, as shown on these three certain maps, dated April 7, 1952, designated "Home Ranch", "Calf Pasture Field" and "Upper Ranch", and on file in the office of the State Engineer of Nevada. Said maps are hereby expressly approved by the owners of the Robert Agee Ranch and the Canal Company, and by reference made a part hereof and by the State Engineer of Nevada by his approval of this agreement.

(c) The owners of the Robert Agee Ranch agree to withdraw Application No. 11978 filed with the State Engineer of Nevada on August 26, 1947, by Robert Agee to appropriate 0.74 c.f.s. of the waters of the Salmon River and of the North Fork of the Salmon River, and to withdraw Application No. 11979, filed on August 26, 1947, by Robert Agee to appropriate 0.19 c.f.s. of the waters of the Salmon River.

(d) Said owners agree not to appropriate any of the waters of the Salmon River or its tributaries for any other lands than those hereinabove specifically described, and agree to confine the use of the waters of said streams to the lands described in Exhibit L hereto attached, and particularly agree to accept the waters herein provided for use on the said specific acreage and no other, as provided in this agreement in full satisfaction of any and all rights in and to the waters of the Salmon River and its tributaries which they have or might claim under either said Federal Court Decree, said Nevada State Court Decree, under the laws of the State of Nevada, or otherwise; and further agree not to take any steps by means of applications for change of points of diversion or place of use, or otherwise, to use said water on any other or different lands other than those described in Exhibit L hereto attached.

20. LESTER AGEE RANCH

(a) Lester Agee and Dorothy Agee, his wife, hereinafter referred to as the Owners of Lester Agee Ranch and their heirs, successors and assigns, are acknowledged to be the owners of, to have the right to use, and shall be entited to annually divert from Willow Creek, Wilson Creek and Shack Creek (including the diversion of water from Wilson Creek to Shack Creek) without measurement thereof, sufficient water for domestic use, for stock water use on the lands hereinafter described and to beneficially irrigate 498 acres of land, more or less, more particularly described on those four pages marked Exhibit M, and

headed "Lester Agee Home Tract," "Desert Entry," "Upper Tract," and "Plantation" and by reference made a part hereof.

(b) It is understood that the above described acreage was established by the survey made in 1951 under the supervision of W. H. Settlemeyer, Licensed State Water Rights Surveyor, by John E. Hayes, as shown on those four certain maps, dated April 7, 1952, designated as the "Home Tract," the "Desert Entry," the "Upper Tract," and the "Plantation Field," and on file in the office of the State Engineer of Nevada. Said maps are hereby expressly approved by the owners of the Lester Agee Ranch and the Canal Company, and by reference made a part hereof and by the State Engineer of Nevada by his approval of this agreement.

(c) The owners of the Lester Agee Ranch agree to conform by appropriate amendment, in a manner satisfactory to the State Engineer of Nevada, existing permits and certificates to the acreage described above and to amend Permit No. 2709, Certificate No. 912, to confine irrigation from Shell Creek to not to exceed 10 acres to be designated by said owners in Sections 10 and 11, T. 46 N., R. 62 E.

(d) Said owners agree not to appropriate any of the waters of the Salmon River or its tributaries for any other lands than those hereinabove specifically described, and agree to confine the use of the waters of said streams to the lands described in Exhibit M hereto attached, and particularly agree to accept the waters herein provided for use on said specific acre-

age and no other, as provided in this agreement in full satisfaction of any and all rights in and to the waters of the Salmon River and its tributaries which they have or might claim under either said Federal Court Decree, said Nevada State Court Decree, under the laws of the State of Nevada, or otherwise; and further agree not to take any steps by means of applications for change of points of diversion or place of use, or otherwise, to use said water on any other or different lands other than those described in Exhibit M hereto attached.

21. GILMER RANCH

(a) Walter M. Gilmer and Bessie C. Gilmer, his wife, hereinafter referred to as the owners of Gilmer Ranch and their heirs, successors and assigns, are acknowledged to be the owners of, to have the right to use, and shall be entitled to annually divert from Sun Creek and Deer Creek without measurement thereof, sufficient water for domestic use, for stock water use on the lands hereinafter described and to beneficially irrigate 798.64 acres of land, more or less, more particularly described on those five pages marked Exhibit N, and headed "Gilmore's Helen O'Neil," "Bull Pasture (the Russell place)," "Upper Sun Creek," "Lower Sun Creek" and "North or Lowest Sun Creek Field."

(b) It is understood that the above described acreage is confined to the acreage now under irrigation (except to the agreed expansion of 216 acres of land lying immediately adjacent to and contiguous with the present irrigated Lower Sun Creek Meadow), as established by the survey made in 1951 under the supervision of W. H. Settlemeyer, Licensed State Water Rights Surveyor, by John E. Hayes, as shown on those five certain maps, dated April 7, 1952, designated "Helen O'Neil Tract," "Bull Pasture," "Upper Sun Creek," "Lower Sun Creek," and "North or Lower Field on Sun Creek," and on file in the office of the State Engineer of Nevada. Said maps are hereby expressly approved by the owners of the Gilmer Ranch and the Canal Company, and by reference made a part hereof, and by the State Engineer of Nevada by his approvel of this agreement.

(c) Walter M. Gilmer and Bessie C. Gilmer, his wife, hereinafter referred to as the Owners of Gilmer Ranch, and their heirs, successors and assigns, are acknowledged to be the owners of, to have the right to use, and shall be entitled to annually divert from Camp Creek, without measurement thereof, sufficient water for domestic use, for stock water use on the lands hereinafter described and to beneficially irrigate 678 acres of land, more or less, more particularly described on those three pages marked Exhibit O and headed "Gilmer's Camp Creek Ranch," and "West Field on Camp Creek", and by reference made a part hereof.

(d) It is further understood that the above described acreage was established by the survey made in 1951 under the supervision of W. H. Settlemeyer, Licensed State Water Rights Surveyor, by John E. Hayes, as shown on those two certain maps, dated April 7, 1952, designated "Camp Creek" and "West

Field on Camp Creek", and on file in the office of the State Engineer of Nevada. Said maps are hereby expressly approved by the owners of the Gilmer Ranch and the Canal Company, and by reference are made a part hereof, and by the State Engineer of Nevada by his approval of this agreement.

(e) The owners of the Gilmer Ranch agree to withdraw Applications No. 11980, 11981 and 11983, filed with the State Engineer of Nevada, August 26, 1947, by Walter M. Gilmer to appropriate 10.75 c.f.s. of the waters of Sun Creek, and to withdraw Application No. 11982 filed with the State Engineer of Nevada on August 26, 1947, by Walter M. Gilmer to appropriate 6.4 c.f.s. of the waters of Camp Creek, and agree to conform by appropriate transfer, amendment or by filing new applications, in a manner satisfactory to the State Engineer of Nevada, existing permits and certificates to the acreage above described.

(f) Said owners agree not to appropriate any of the waters of the Salmon River or its tributaries for any other lands than those hereinabove specifically described, and agree to confine the use of the waters of said streams to the lands described in Exhibits N and O hereto attached, and particularly agree to accept the waters herein provided for use on the said specific acreage and no other, as provided in this agreement in full satisfaction of any and all rights in and to the waters of the Salmon River and its tributaries which they have or might claim under either said Federal Court Decree, said Nevada State Court Decree, under the laws of the State of Nevada, or otherwise; and further agree not to take any steps by means of applications for change of points of diversion or place of use, or otherwise, to use said water on any other or different lands other than those described in Exhibits N and O hereto attached.

(g) The owners of the Gilmer Ranch shall have the right to construct ditches to detour beaver dams and other stream obstructions in Sun Creek, Deer Creek, and Camp Creek. The owners of the Gilmer Ranch agree, in order to confine irrigation to the "North or Lower Fields of Sun Creek", comprising 25.04 acres, that they will construct any necessary waste ditches or channels at the northern end of said track to convey the return flow, or other available waters, directly into the main channel of Sun Creek.

(h) The Canal Company shall have no right to dredge or make channel changes on Camp Creek, Deer Creek or Sun Creek.

22. The Nevada Land Owners agree: (1) That there shall be no diversion of water from the watershed of one stream to another (except only as provided in Paragraph 20 (a) hereof); and, (2) That no reservoirs shall be constructed, and no water shall be stored by man made works on Salmon River, or any of its tributaries, or upon any lands owned by them (except only for the reservoir provided for in paragraph 16 (e) hereof).

23. The rights to the use of the waters of the Salmon River and its tributaries (described in paragraphs 15, 16, 17, 18, 19, 20, and 21 hereof, and limited to the acreage therein described and in 31), shall be

senior and paramount to the rights of the Canal Company. The Canal Company shall have the right as between the parties hereto subordinate only to the rights of the Nevada Land Owners as in this agreement set out, to divert, have and use all of the waters of the Salmon River and its tributaries, for use upon the lands of its irrigation project in the State of Idaho, and the right to transfer the place of use of such water to said lands; provided only that the Canal Company may at any time use said waters or a portion thereof on its Nevada lands, in lieu of the Idaho lands, at its option.

24. The Nevada Land Owners by this agreement specifically recognize the right of the Canal Company to transfer for use in Idaho the water rights formerly appurtenant to the lands in Nevada purchased by the Canal Company by deed dated May 24, 1947, and consent that the State Engineer of Nevada may grant the pending applications of Canal Company to make such water transfer.

The Nevada Land Owners agree that there is not annually available from Salmon River and its tributaries sufficient water to fill the water rights of the Canal Company as set forth in paragraphs 1 and 2 hereof; and that all of the waters which will be available to the Canal Company under the terms and conditions hereof are and will be required for the proper irrigation of the lands included within Canal Company's irrigation project in the State of Idaho, which includes a gross area of 35,000 acres, and that all of said waters can be beneficially used thereon.

25. The parties hereto agree that the waters of the Salmon River, and its tributaries, are fully appropriated, and such finding shall be binding between and among the parties to this agreement; and the Nevada Land Owners hereby expressly disclaim any right, title or interest in and to the waters of the Salmon River, and its tributaries, except those specifically allotted to said owners by the terms of this agreement.

26. This agreement shall not become effective until the State Engineer of Nevada, upon the advice and approval of the Attorney General of Nevada, has:

(1) Entered an order granting the applications of the Canal Company described in paragraph 5 hereof, pending in the office of said State Engineer for the transfer of water rights formerly appurtenant to Nevada lands purchased under said deed dated May 24, 1947, for use in Idaho; and

(2) Made a final determination that there are no remaining waters of the Salmon River, or any of its tributaries, except for those rights provided for in this agreement, subject to appropriation in Nevada; but without prejudice, however, as to any applications to appropriate the waters of Salmon River or any of its tributaries by persons not a party to this agreement, pending as of the date of this agreement.

27. The parties hereto agree that this agreement may be considered as, and function as a stipulation for the entry of a decree, approving and embodying the substance of this agreement, either in the action

entitled *"Salmon River Canal Company, Ltd., a corporation* v. *Walter M. Gilmer, et al.,"* pending in the United States District Court for the District of Nevada, more particularly described in paragraph 13 hereof, or in an action to be instituted in the District Court for the Fourth Judicial District in and for the County of Elko. The Canal Company shall have the right to select the forum and the Nevada Land Owners agree that they and their attorneys will take every act and step and execute promptly all other stipulations, agreements or appearances required, all to the end that such decree may be expeditiously entered.

The validity and effectiveness of this agreement shall in no way be contingent or conditioned upon the obtaining of such stipulated decree.

28. The parties hereto consent that the terms of this agreement, or the terms of a stipulated decree embodying the substance of this agreement, may be incorporated into an Interstate Compact, either separately between the States of Idaho and Nevada, to be ratified by the legislatures of the respective states, or as a part of an Inter-state Columbia Basin Compact among the states comprising the Columbia River drainage basin, or both.

29. The Nevada Land Owners agree to use all reasonably diligent efforts to keep all ditches and channels on their respective lands clear and free from obstructions, and to cooperate with the Canal Company in constructing and maintaining waste or drainage ditches which will return waste irrigation waters to the natural stream beds after the same have completed their use upon the respective lands of the Nevada Land Owners as herein provided; and said owners further agree to cooperate in every way possible with the proper State and Federal authorities in the control of beaver activities to prevent interference with the flow of water in the Salmon River and its tributaries.

30. The parties agree that it will be helpful to the continued preservation of the rights awarded herein that the boundaries of the lands belonging to the Nevada Land Owners which are awarded water rights herein, be marked and delineated by permanent markers and, accordingly, the Nevada Land Owners consent and agree that the Canal Company may, to the extent and in the manner, and at the time or times selected by it, erect permanent markers at or along the boundaries of the Nevada lands which are awarded prior rights hereunder as the same are described herein and shown on the maps referred to herein as being filed in the office of the State Engineer of the State of Nevada.

31. It is agreed that none of the restrictions or limitations elsewhere herein contained shall prevent the Nevada Land Owners or their successors in interest from continuing to own or use or in any way in the future acquire necessary water rights for stock watering purposes only in accord with the usual custom and practice of the area in order that they may properly use the range lands belonging to them or available to them in the drainage basin of the Salmon River and its tributaries.

32. This agreement shall be binding on the parties hereto, their successors, and assigns forever, and specifically shall run with the lands herein above described and shall be binding upon all subsequent owners and occupants of said premises forever.

IN WITNESS WHEREOF, the Canal Company has caused this instrument to be executed in its name by its proper officials, first duly authorized in the premises by its Board of Directors, and the other parties hereto have executed the same, all on the day and year first above written.

Attest:

/s/ Ray E. Smith
Ray E. Smith
Secretary

Salmon River Canal Company, Ltd.
/s/ By F. J. Douglas
/s/ Oren F. Boies
/s/ Esther Teresa Boies
/s/ Eyer H. Boies
/s/ Marla Marie Boies
/s/ June Agee
/s/ Horace A. Agee
/s/ Esther A. Agee
/s/ H. Vance Agee
/s/ Dorothy L. Agee
/s/ Robert V. Agee
/s/ Thelma V. Agee
/s/ Lester Agee

/s/ Dorothy Agee
/s/ J. J. Strode
/s/ Nevada Strode
/s/ Walter M. Gilmer
/s/ Bessie Gilmer

The foregoing agreement is hereby ratified and approved this ..... day of October 6, 1952.

/s/ Hugh L. Shamberger
State Engineer, State of Nevada

In the District Court of the United States of America
in and for the District of Nevada

No. 913

Salmon River Canal Company, Ltd., a corporation,
Plaintiff,

vs.

Walter M. Gilmer and Bessie C. Gilmer, his wife; Oren F. Boies and Esther Teresa Boies, his wife; Robert J. Agee and Thelma Agee, his wife; Lester Agee also known as W. L. Agee and Dorothy Agee, his wife, Eyer H. Boies and Marla Marie Boies, his wife; June Agee; Esther A. Agee; H. Vance Agee and Dorothy L. Agee, his wife; J. J. Strode and Nevada Strode, his wife;
Defendants.

JUDGMENT

The above-entitled cause having come on for hearing and it appearing to the Court that plaintiff and defendants have concluded all issues in this cause and have entered into a settlement agreement under date of May 20, 1952; and, thereafter, have entered into a stipulation that this Court should enter judgment in such cause in accordance with said agreement and said stipulation, the original of said settlement agreement having been attached to said stipulation

and filed with the Clerk of this Court; and upon consideration of the records and files herein, and the stipulation and settlement agreement attached to said stipulation, this Court finds that judgment should be entered in accordance therewith;

NOW THEREFORE, this Court in accordance with such settlement agreement and such stipulation does hereby order, adjudge and decree as follows:

1. Plaintiff is the owner of license and water right certificate No. 2659 for 1,250 c.f.s. of the water of the Salmon River, with priority of December 29, 1906; and license and water right certificate No. 3267 for 500 c.f.s. with priority of August 22, 1907; and license and water certificate No. 5519 for 1,000 c.f.s. of the water of the Salmon River, with priority of September 7, 1909, issued by the Commissioner of Reclamation of the State of Idaho, after due compliance by plaintiff and its predecessors in interest, with the laws of the State of Idaho, for the irrigation of lands in certain legal subdivisions in Twin Falls County, State of Idaho, covering a gross acreage of 39,285.83 acres; and

2. Plaintiff, for the purpose of having its rights adjudicated in the Salmon River and its tributaries, did on the 20th day of May, 1912, institute a proceeding entitled *Twin Falls Salmon River Land and Water Company, a corporation, and Salmon River Canal Company Limited, a corporation, v. Vineyard Land and Stock Company, a corporation,* in the District Court of the United States for the District of Idaho, Southern Division, No. 405, pursuant to which

there was entered on the 23rd day of March, 1916, a decree adjudicating the water rights in the Salmon River and in which the following water rights were awarded:

(a) There was decreed to Vineyard Land and Stock Company a prior right of 12,500 acre feet of water of said stream to be appurtenant to certain lands in said decree described.

(b) There was decreed to plaintiff herein, subject to the above-mentioned prior right, the waters of said stream and its tributaries at the rate of 1,500 cubic feet per second under Permit No. 2659 issued by the State Engineer of the State of Idaho; said right dating from December 29, 1906, and further to use 500 cubic feet per second of the waters of said stream under Permit No. 3267 issued by the State Engineer of the State of Idaho, said right dating from August 22, 1907; and further the right to use 1,000 cubic feet per second of the waters of said stream under Permit No. 5519, issued by the State Engineer of the State of Idaho, said right dating from September 7, 1909; provided, however, that the maximum aggregate diversion by the plaintiff herein for any one irrigating season should not exceed 235,000 acre feet, the same to be measured at the outlet of the reservoir of plaintiff herein at or immediately above what is known as the Salmon River Dam.

(c) There was likewise awarded to the Vineyard Land and Stock Company a tertiary right of 12,000 acre feet of other waters of the Salmon River and

its tributaries, subordinate to the right last above mentioned, for the use on lands of plaintiff herein described in said decree.

2A. The State Engineer of the State of Nevada did heretofore make and find a certain Order of Determination in conformity with the statutes of said State which said Order was thereafter confirmed, as therein amended, in certain proceedings entitled, "In the Matter of the Determination of the Relative Rights in and to the Water of Salmon River and its Tributaries", in the District Court of the Fourth Judicial District of the State of Nevada in and for the County of Elko, the decree being entered on March 3, 1923, and which said Decree is hereafter referred to herein as "Nevada State Court Decree", and which said decree awarded water rights for the lands hereinafter described.

3. Thereafter by mesne conveyance all of the lands formerly owned by Vineyard Land and Stock Company in Elko, Nevada, and to which water rights had been decreed in the last mentioned decree, were conveyed to Wilkins & Wunderlich, a co-partnership doing business as the U.C. Land and Cattle Company; and thereafter certain of the lands to which water rights had been awarded by said decree, being those commonly known as the Hubbard and Vineyard Ranches, and being those described in Exhibit 5 attached to said settlement agreement, were conveyed, together with the water rights described in Paragraph 6 hereof, to certain of the defendants as hereinafter set out; and certain of the other of said lands

to which water rights had been decreed, being the lands commonly known as the Bridge Ranch, and being the lands described in Paragraph 7 hereof, were conveyed by mesne conveyance, together with the water right described in said paragraph, to certain of the other defendants; and all of the remaining lands to which waters were awarded in said decree and all of the other water rights awarded by said Federal Court Decree of March 23, 1916, or in any manner appurtenant to or belonging to said lands have been conveyed to the plaintiff herein, either by direct or mesne conveyances from Wilkins & Wunderlich; and the plaintiff herein is now the owner of all the water rights awarded by said last mentioned decree other than those specifically conveyed to and owned by the defendants herein who own the Hubbard, Vineyard and Bridge ranches as hereinafter specifically described.

4. Plaintiff herein received, by conveyance dated May 24, 1949, title to, and is now the owner of, and is the successor in interest to Vineyard Land and Stock Company in those certain lands in Elko County, Nevada, which are more fully described on the list attached to said settlement agreement, marked Exhibit A; and likewise received conveyance of, and is now the successor interest to Vineyard Land and Stock Company in, and the owner of, all of the water rights awarded to said last mentioned lands by said Federal Court Decree of March 23, 1916, the Nevada State Court Decree of March 3, 1923, the laws of Nevada or otherwise, (other than those portions of

said water rights which are owned by the defendants as elsewhere herein set out) the specific description of said water rights so conveyed to, and now owned by, the plaintiff herein being:

> "All water, water rights, rights to the use of water, dams, ditches, canals, reservoirs, pipes, pipelines and other means for the diversion and/or use of water appurtenant to and/or now or heretofore used or enjoyed in connection with said land, or any part thereof, including but without limitation thereto, 8,000.97 acre feet of water annually out of the aggregate rights decreed and adjudicated" in said decree of March 23, 1916.

5. The plaintiff herein did on May 4, 1949, in conformity with the statutes of the State of Nevada, file with the said Engineer of said State, eight applications to transfer all of the waters which had been awarded by the Nevada State Court Decree of March 3, 1923, to the lands in Elko County, Nevada, which had been conveyed to plaintiff herein and which are described in Exhibit A to said settlement agreement (except only limited rights from Knoll Creek, Warm Springs Creek and Trout Creek) by applications Nos. 12888 to 12895, inclusive; said applications being to transfer the said waters to, and for use upon those lands situated in the State of Idaho which comprise the irrigation project owned and operated by plaintiff herein and which is commonly known as the Salmon River Canal Company Irrigation Project; and the plaintiff herein has, pending final determination of said applications, been beneficially using said waters

on said Idaho lands continuously since the year 1947, comprising a gross area of approximately 35,000 acres.

6. Defendants herein Oren F. Boies and Esther Teresa Boies, his wife; Eyer H. Boies and Marla Marie Boies, his wife; and June Agee are now the owners of those lands described in Exhibit B attached to said settlement agreement and which are commonly known as the Hubbard and Vineyard Ranches and of the water rights thereto appurtenant; that the deed conveying said lands to said parties conveyed the water right appurtenant thereto in the following language and subject to the following restrictions:

> "Together with all water, water rights, rights to the use of water, dams, ditches, canals, reservoirs, pipes, pipe lines and any other means for the diversion and/or use of water appurtenant to and/or now or heretofore used or enjoyed in connection with said land, or any part thereof, including, but without limitation thereto, 2360.13 acre feet of water annually out of the aggregate rights decreed and adjudicated to the predecessors of the grantors in the District Court of the United States in and for the District of Idaho; Southern Division, entitled 'Twin Falls Salmon River Land and Water Company, a corporation, and Salmon River Canal Company, Limited, a corporation, plaintiffs, vs. Vineyard Land and Stock Company, a corporation, Defendant, and Utah Construction Company, successor in interest to the defendant Vineyard Land and Stock Company, a corporation, Defendant, No. 405', as modified by subsequent decisions and orders in said cause, and as modified on appeal to the Circuit Court of Appeals, Ninth Circuit (85 Fed 2d 769) and in addition thereto the right to continue to permit portions of said lands to be flooded by the spring run-off and overflow and surplus waters of certain tributaries to Salmon River to the extent and in the manner as defined by said United States Circuit Court of Appeals; * * * provided, however, that none of the language used foregoing, whether general or otherwise, shall in any way give grantees the right to any more than 2360.13 acre feet out of the decreed rights above described, * * *";

7. Defendants herein J. J. Strode and Nevada Strode, his wife, are now the owners as successors in interest by mesne conveyances from the Vineyard Land and Stock Company of a portion of the lands which were awarded water rights by said Federal Court Decree of March 23, 1916 and said Nevada State Court Decree of March 3, 1923, being those lands commonly known as the Bridge Ranch, and which are more particularly described as follows, to-wit:

T. 47 N., R. 64 E., M. D. B. & M.

Sec. 13: SE¼, S½SW¼, NE¼SW¼
23: N½NE¼
24: N½N½

T. 47 N., R. 65 E., M. D. B. & M.

Sec. 10: SE¼SE¼
11: SW¼SW¼
15: S½SW¼, NE¼SW¼, SE¼NW¼, N½NE¼

16: S½SW¼, SW¼SE¼
17: SW¼, S½NW¼, S½SE¼
18: Lots 2, 3, 4; E½SW¼, SE¼NW¼, S½NE¼, N½SE¼, SE¼SE¼
21: N½N½
22: NW¼NW¼

T. 47 N., R. 66 E., M. D. B. & M.

Sec. 3: Lot 4
Sec. 4: Lot 1
12: NW¼NE¼, S½NW¼, NW¼SW¼
22: W½NW¼
24: SE¼NE¼

T. 47 N., R. 67 E., M. D. B. & M.

Sec. 6: Lots 1, 2, 3

The water rights appurtenant to said lands were conveyed in the following language and subject to conditions and restrictions therein stated as follows:

"Together with all water, water rights, rights to the use of water, dams, ditches, canals, reservoirs, pipes, pipe lines and any other means for the diversion and/or use of water appurtenant to and/or now or heretofore used or enjoyed in connection with said land, or any part thereof, including, but without limitation thereto, 892.96 acre feet of water annually out of the aggregate rights decreed and adjudicated to the predecessors of the first parties in the District Court of the United States in and for the District of Idaho, Southern Division, entitled 'Twin Falls Salmon River Land and Water Company, a corporation, and Salmon River Canal Company, Limited, a corporation, Defendant, and Utah

Construction Company, successor in interest to the defendant Vineyard Land and Stock Company, a corporation, Defendant, No. 405', as modified by subsequent decisions and orders in said cause, and as modified on appeal to the Circuit Court of Appeals, Ninth Circuit (85 Fed. 2d 769) and in addition thereto the right to continue to permit portions of said lands to be flooded by the spring run-off and overflow and surplus waters of certain tributaries to Salmon River to the extent and in the manner as defined by said United States Circuit Court of Appeals: * * * provided, however, that none of the language used foregoing, whether general or otherwise, shall in any way give second party the right to any more than 892.96 acre feet out of the decreed rights above described * * *";

8. Defendants herein Esther A. Agee, and H. Vance Agee and Dorothy L. Agee, his wife, are now the owners of those lands in Elko County, Nevada, described in Exhibit C to said settlement agreement commonly known as the Home Ranch, to which certain water rights from the Salmon River, Cottonwood Creek, Canon Creek and Pole Creek, tributaries of the Salmon River are appurtenant as more particularly described in said Nevada State Court Decree of March 3, 1923, and for which lands certain other water rights are claimed to be appurtenant from Cottonwood Creek under Permit No. 1687, Certificate No. 329, issued on May 12, 1917, by the State Engineer of Nevada and for which certain other water rights are sought under Applications Nos. 11984, 11985 and 11986, filed with State Engineer of

Nevada on August 26, 1947 and which are now pending before said State Engineer.

9. Defendants herein Robert J. Agee and Thelma Agee, his wife, are now the owners of those lands in Elko County, Nevada, described in Exhibit D to said settlement agreement, known as the Robert Agee Ranch, to which certain water rights from the Salmon River and from the North Fork of the Salmon River are appurtenant, as more particularly described in said Nevada State Court Decree of March 3, 1923; and for which lands certain other water rights are sought from the North Fork of the Salmon River under applications Nos. 11978 and 11979, filed with the State Engineer of Nevada on August 26, 1947; and which are now pending before said State Engineer.

10. Defendants herein Lester Agee and Dorothy Agee, his wife, are now the owners of those lands in Elko County, Nevada, described in Exhibit E to said settlement agreement, known as the Lester Agee Ranch, to which certain water rights from Willow Creek, and Wilson Creek are appurtenant, as more particularly described in said Nevada State Court Decree of March 3, 1923, and for which lands certain other water rights are claimed to be appurtenant from Shack Creek under Permit No. 1659, Certificate No. 365, issued by the State Engineer of Nevada, on December 16, 1918, and from Schell Creek under Permit No. 2709, Certificate No. 912, issued December 17, 1923, by the State Engineer of Nevada.

11. Defendants herein Walter M. Gilmer and Bessie C. Gilmer, his wife, are now the owners of those lands in Elko County, Nevada, described in Exhibit F to said settlement agreement known as the Gilmer Ranch, to which certain water rights from Sun Creek, Deer Creek and Camp Creek, tributaries of the Salmon River are appurtenant, as more particularly described in said Nevada State Court Decree of March 3, 1923; and for which lands certain other water rights are claimed to be appurtenant from Sun Creek under Permit No. 2085, issued by the State Engineer of Nevada, on June 19, 1912; Permit No. 2313, issued by the State Engineer of Nevada on April 21, 1913; Permit No. 2314, issued by the State Engineer of Nevada on April 21, 1913; and Permit No. 2575 issued by the State Engineer of Nevada on April 21, 1913; and for which lands certain water rights are claimed to be appurtenant from Camp Creek under Permit No. 1385, Certificate No. 135, issued December 22, 1913; Permit No. 1883, Certificate No. 246, issued December 12, 1914; Permit No. 1884, Certificate No. 247, issued December 12, 1914; Permit No. 1885, Certificate No. 248, issued December 12, 1914; Permit No. 1886, Certificate No. 249, issued December 12, 1914; and for which certain other water rights are sought under Applications Nos. 11980, 11981, 11982 and 11983, filed with the State Engineer of Nevada on August 26, 1947, and which are still pending before said State Engineer.

12. VINEYARD RANCH

(a) Defendants herein Oren F. Boies and Esther Teresa Boies, his wife, Eyer H. Boies and Marla Marie Boes, his wife; and June Agee, hereinafter referred to as the owners of the Vineyard Ranch, and their heirs, successors and assigns, are the owners of, have the right to use, and shall be entitled to annually divert from Jake's Creek and the Salmon River through the Tunnel and Vineyard ditches, without measurement thereof, sufficient water for domestic use, for stock water use on the lands hereinafter described, and to beneficially irrigate 942 acres of land more or less, more particularly described on those two pages marked Exhibit G and headed "Vineyard Ranch" attached to said settlement agreement, and attached hereto as Exhibit G and made a part hereof. Said owners shall not appropriate any of the waters of the Salmon River or its tributaries for any other lands than those hereinabove specifically described, and shall confine the use of the waters of said streams to the lands described in said Exhibit G, and shall accept the waters herein provided for use on the said specific acreage and no other as provided in this judgment in full satisfaction of any and all rights in and to the waters of the Salmon River and its tributaries which they have or might claim under either said Federal Court Decree of March 23, 1916, said Nevada State Court Decree of March 3, 1923, under the laws of the State of Nevada, or otherwise; and shall not take any steps by means of application for change of points of diversion or place of use or otherwise, to use said water on any other or different lands other than those described in said Exhibit G. There shall be no irrigation on said lands after September 1 of each calendar year.

(b) The above described acreage was established by the survey made in 1951 under the supervision of W. H. Settelmeyer, Licensed State Water Rights Surveyor, by John E. Hayes, as shown on that certain map dated April 7, 1952, designated "Vineyard Ranch" and on file in the office of the State Engineer of Nevada, a true copy of which is attached to said stipulation filed herein.

(c) The owners of Vineyard Ranch shall withdraw Application No. 12412 filed with the State Engineer of Nevada on April 12, 1948, by Albert H. Agee to appropriate 0.47 c.f.s. of the waters of the Salmon River and Application No. 11987 filed on August 26, 1947, by Oren F. Boies, Albert Agee and H. V. Agee to appropriate 4.93 c.f.s. of the waters of the Salmon River.

(d) The plaintiff herein shall have the right, from time to time and as often as it desires, to dredge and straighten the channel of the Salmon River starting at the point where the Salmon River leaves the north end of the Vineyard Ranch and continuing as far upstream on said ranch as the plaintiff at any time deems necessary or appropriate; provided, however, that the plaintiff shall take all necessary steps to prevent the channel from becoming unreasonably or unnecessarily deep, and it shall be its responsibility, in connection with any channel changes, to replace or

repair any existing diversion structures which may be destroyed or injured by the operations of plaintiff herein. Plaintiff herein also shall have the right, from time to time and as often as it desires to drain swamp areas and springs on the Vineyard Ranch and to dredge channels therefrom to the Salmon River. In doing such work, plaintiff shall take all reasonable steps and precautions to see that it does not unreasonably interfere with the use of said land for its usual purpose. The owners of the Vineyard Ranch shall have the right to irrigate those swamp areas or sub-irrigated lands which may be drained or dried up by the plaintiff's future activities, and which lands are within the above described acreage. The owners of the Vineyard Ranch shall have the right to install a new diversion dam and ditches to irrigate lands lying on the westerly and northerly side of the Salmon River which are now sub-irrigated, in the event said owners find it necessary to do so to irrigate areas which are now sub-irrigated, provided, however, that such new diversion dam shall be so designed and constructed that it shall allow the flow of the stream to pass unimpeded (except only as it may be needed to be checked to permit such diversion) and the plans and designs of such dam shall be subject to the prior approval of the plaintiff herein, and in conformity with the laws of Nevada relating to dams.

13. HUBBARD RANCH

(a) Defendants herein Oren F. Boies and Esther Teresa Boies, his wife; Eyer H. Boies and Marla Marie Boies, his wife; and June Agee, hereinafter

referred to as the Owners of the Hubbard Ranch and their heirs, successors and assigns, are the owners of, have the right to use, and shall be entitled to annually divert from Willow or Dry Creek and Jake's Creek, sufficient water for domestic use, for stock water use on the lands hereinafter described, more particularly described on those two pages marked Exhibit H and headed "Hubbard Ranch" attached to said settlement agreement, and attached hereto as Exhibit H and made a part hereof.

(b) The above described acreage was established by the survey made in 1951 under the supervision of W. H. Settelmeyer, Licensed State Water Rights Surveyor, by John E. Hayes, as shown on that certain map dated April 7, 1952, designated "Hubbard Ranch" and on file in the office of the State Engineer of Nevada, a true copy of which is attached to said stipulation herein.

(c) The owners of the Hubbard Ranch shall withdraw Application No. 12411 filed on April 12, 1948, by Albert H. Agee with the State Engineer of Nevada to appropriate 3 c.f.s. of the waters of Willow or Dry Creek and Application No. 11988 filed on August 26, 1947, by Oren F. Boies, Albert H. Agee and H. V. Agee to appropriate 6.16 c.f.s. of the waters of Willow or Dry Creek.

(d) Said owners shall not appropriate any of the waters of the Salmon River or its tributaries for any other lands than those hereinabove specifically described, and shall confine the use of the waters of said streams to the lands described in said Exhibit H, and

shall accept the waters herein provided for use on the said specific acreage and no other as provided in this judgment in full satisfaction of any and all rights in and to the waters of the Salmon River and its tributaries which they have or might claim under either said Federal Court Decree of March 23, 1916, said Nevada State Court Decree of March 3, 1923, under the laws of the State of Nevada, or otherwise; and shall not take any steps by means of applications for change of points of diversion or places of use, or otherwise, to use said water on any other or different lands other than those described in said Exhibit H. There shall be no irrigation on said lands after September 1 of each calendar year.

(e) The owners of the Hubbard Ranch shall have the right to construct a reservoir off Jake's Creek in Section 16, Township 43 N., Range 63 E. if the pending application is so amended to provide that diversion into the reservoir shall be restricted to the period from September 1 to April 1 in any winter, and that no water shall be diverted in to said reservoir at any other time; and the owners of the Hubbard Ranch shall not make any applications for any other or different reservoirs.

14. BRIDGE RANCH

(a) Defendants herein J. J. Strode and Nevada Strode, his wife, hereinafter referred to as the owners of Bridge Ranch, and their heirs, successors and assigns, are the owners of, have the right to use, and shall be entitled to annually divert from Shoshone Creek without measurement thereof, sufficient water

for domestic use, for stock water use on the lands hereinafter described and to beneficially irrigate 424 acres of land, more or less, more particularly described on that page marked Exhibit I, and headed "Bridge Ranch" attached to said settlement agreement, and attached hereto as Exhibit I and made a part hereof.

(b) The above described acreage was established by the survey made in 1951 under the supervision of W. H. Settelmeyer, Licensed State Water Rights Surveyor, by John E. Hayes, as shown on that certain map dated April 7, 1952, designated "Bridge Ranch" and on file in the office of the State Engineer of Nevada, a true copy of which is attached to said stipulation filed herein.

(c) The plaintiff herein shall have the right, from time to time and as often as it desires, to dredge and straighten the channel of Shoshone Creek starting at the point where Shoshone Creek leaves the west end of the Bridge Ranch and continuing as far upstream as the plaintiff at any time deems necessary and appropriate; provided, however, that the plaintiff shall take all necessary steps to prevent the channel from becoming unreasonably or unnecessarily deep, and it shall be its responsibility, in connection with any channel changes to replace or repair any existing diversion structures which may be destroyed or injured by the operation of plaintiff herein. Plaintiff herein also shall have the right from time to time, and as often as it may desire, to drain swamp areas and springs on the Bridge Ranch and to dredge channels therefrom to Shoshone Creek.

(d) Said owners shall not appropriate any of the waters of the Salmon River or its tributaries for any other lands than those hereinabove specifically described, and shall confine the use of the waters of said streams to the lands described in said Exhibit I, and shall accept the waters herein provided for use on the said specific acreage and no other, as provided in this judgment in full satisfaction of any and all rights in and to the waters of the Salmon River and its tributaries which they have or might claim under either said Federal Court Decree of March 23, 1916, said Nevada State Court Decree of March 3, 1923, under the laws of the State of Nevada, or otherwise; and shall not take any steps by means of applications, for change of points of diversion or place of use, or otherwise, to use said water on any other or different lands other than those described in said Exhibit I. There shall be no irrigation on said lands after September 1 of each calendar year.

15. THE HOME RANCH

(a) Defendants herein Esther A. Agee, H. Vance Agee and Dorothy L. Agee, his wife, hereinafter referred to as the Owners of Home Ranch and their heirs, successors and assigns, are the owners of, have the right to use, and shall be entitled to annually divert Cottonwood Creek without measurement thereof, sufficient water for domestic use, for stock water use on the lands hereinafter described and to beneficially irrigate 500 acres of land, more or less, more particularly described on that page marked Exhibit J, and headed "Cottonwood Ranch" attached

to said settlement agreement, and attached hereto as Exhibit J and made a part hereof.

(b) The above described acreage was established by the survey made in 1951 under the supervision of W. H. Settelmeyer, Licensed State Water Rights Surveyor, by John E. Hayes, as shown on that certain map dated April 7, 1952, designated "Cottonwood Ranch," and on file in the office of the State Engineer of Nevada, a true copy of which is attached to said stipulation filed herein.

(c) Defendants herein Esther A. Agee, H. Vance Agee and Dorothy L. Agee, his wife, hereinafter referred to as the owners of Home Ranch and their heirs, successors and assigns, are the owners of, have the right to use, and shall be entitled to annually divert from Canyon Creek, Pole Creek, Lime Creek, and the Salmon River without measurement thereof, sufficient water for domestic use, for stock water use on the lands hereinafter described and to beneficially irrigate 1,022 acres of land, more or less, more particularly described on that page marked Exhibit K, and headed "Agee's Canyon Creek," attached to said settlement agreement, and attached hereto as Exhibit K and made a part hereof.

(d) The above described acreage (except for approximately 100 acres on Lime Creek in Section 36, T. 47 N., R. 61 E., MDB&M) was established by the survey made in 1951 under the supervision of W. H. Settelmeyer, Licensed State Water Rights Surveyor, by John H. Hayes, as shown on that certain map dated April 7, 1952, designated "Agee Home Ranch

or Canyon Creek" and on file in the office of the State Engineer of Nevada, a true copy of which is attached to said stipulation filed herein.

(e) The owners of the Home Ranch shall withdraw Applications Nos. 11984, 11985 and 11986, filed with the State Engineer of Nevada on August 26, 1947, by Esther Teresa Boies to appropriate 3.99 c.f.s. of the waters of Cottonwood Creek and said owners shall conform, by appropriate amendment, in a manner acceptable to the State Engineer of Nevada, existing permits and certificates to the acreage described above.

(f) Said owners shall not appropriate any of the waters of the Salmon River or its tributaries for any other lands than those hereinabove specifically described, and shall confine the use of the waters of said streams to the lands described in said Exhibits J and K respectively, and shall accept the waters herein provided for use on the said specific acreage and no other, as provided in this judgment in full satisfaction of any and all rights in and to the waters of the Salmon River and its tributaries which they have or might claim under either said Federal Court Decree of March 23, 1916, said Nevada State Court Decree of March 3, 1923, under the laws of the State of Nevada, or otherwise; and further shall not take any steps by means of application for change of points of diversion or place of use, or otherwise, to use said water on any other or different lands other than those described in said Exhibits J and K respectively.

16. ROBERT J. AGEE RANCH

(a) Defendants herein Robert J. Agee and Thelma Agee, his wife, hereinafter referred to as the Owners of Robert J. Agee Ranch, and their heirs, successors and assigns, are the owners of, have the right to use, and shall be entitled to annually divert from Salmon River and the North Fork of the Salmon River without measurement thereof, sufficient water for domestic use, for stock water use on the lands hereinafter described and to beneficially irrigate 612 acres of land, more or less, more particularly described on those three pages marked Exhibit L, and headed "R. J. Agee Home Tract," "Calf Pasture" and "Upper Ranch," attached to said agreement, and attached hereto as Exhibit L, and made a part hereof.

(b) The above described acreage was established by the survey made in 1951 under the supervision of W. H. Settelmeyer, Licensed State Water Rights Surveyor, by John E. Hayes, a shown on those three certain maps, dated April 7, 1952, designated "Home Ranch," "Calf Pasture Field" and "Upper Ranch," and on file in the office of the State Engineer of Nevada, true copies of which are attached to said stipulation filed herein.

(c) The owners of the Robert Agee Ranch shall withdraw Application No. 11978 filed with the State Engineer of Nevada on August 26, 1947, by Robert Agee to appropriate 0.74 c.f.s. of the waters of the Salmon River and of the North Fork of the Salmon River, and shall withdraw Application No. 11979,

filed on August 26, 1947, by Robert Agee to appropriate 0.10 c.f.s. of the waters of the Salmon River.

(d) Said owners shall not appropriate any of the waters of the Salmon River or its tributaries for any other lands than those hereinabove specifically described, and shall confine the use of the waters of said streams to the lands described in said Exhibit L, and shall accept the waters herein provided for use on the said specific acreage and no other, as provided in this judgment in full satisfaction of any and all rights in and to the waters of the Salmon River and its tributaries which they have or might claim under either said Federal Court Decree of March 23, 1916, said Nevada State Court Decree of March 3, 1923, under the laws of the State of Nevada, or otherwise; and further shall not take any steps by means of applications for change of points of diversion or place of use, or otherwise, to use said water on any other or different lands other than those described in said Exhibit L.

17. LESTER AGEE RANCH

(a) Defendants herein Lester Agee and Dorothy Agee, his wife, hereinafter referred to as the Owners of Lester Agee Ranch and their heirs, successors and assigns, are the owners of, have the right to use, and shall be entitled to annually divert from Willow Creek, Wilson Creek and Shack Creek (including the diversion of water from Wilson Creek to Shack Creek) without measurement thereof, sufficient water for domestic use, for stock water use on the lands hereinafter described and to beneficially irrigate 498

acres of land, more or less, more particularly described on those four pages marked Exhibit M, and headed Lester Agee "Home Tract," "Desert Entry," "Upper Tract," and "Plantation," attached to said settlement agreement, and attached hereto as Exhibit M, and made a part hereof.

(b) The above described acreage was established by the survey made in 1951 under the supervision of W. H. Settelmeyer, Licensed State Water Rights Surveyor, by John E. Hayes, as shown on those four certain maps, dated April 7, 1952, designated as the "Home Tract," the "Desert Entry," the "Upper Tract," and the "Plantation Field," and on file in the office of the State Engineer of Nevada, true copies of which are attached to said stipulation filed herein.

(c) The owners of the Lester Agee Ranch shall conform by appropriate amendment, in a manner satisfactory to the State Engineer of Nevada, existing permits and certificates to the acreage described above and shall amend Permit No. 2709, Certificate No. 912, to confine irrigation from Shell Creek to not to exceed 10 acres to be designated by said owners in Section 10 and 11, T. 46 N., R. 62 E., M.D.B.&M.

(d) Said owners shall not appropriate any of the waters of the Salmon River or its tributaries for any other lands than those hereinabove specifically described, and shall confine the use of the waters of said streams to the lands described in said Exhibit M, and shall accept the waters herein provided for use on the said specific acreage and no other, as provided in this decree in full satisfaction of any and all rights in and

to the waters of the Salmon River and its tributaries which they have or might claim under either said Federal Court Decree of March 23, 1916, said Nevada State Court Decree of March 3, 1923, under the laws of the State of Nevada, or otherwise; and further shall not take any steps by means of applications for change of points of diversion or place of use, or otherwise, to use said water on any other or different lands other than those described in said Exihibit M.

18. GILMER RANCH

(a) Defendants herein Walter M. Gilmer and Bessie C. Gilmer, his wife, hereinafter referred to as the Owners of Gilmer Ranch, and their heirs, successors and assigns, are the owners of, have the right to use, and shall be entitled to annually divert from Sun Creek and Deer Creek without measurement thereof, sufficient water for domestic use, for stock water use on the lands hereinafter described and to beneficially irrigate 798.64 acres of land, more or less, more particularly described on those five pages marked Exhibit N, and headed "Gilmer's Helen O'Neil," "Bull Pasture (the Russell Place)," "Upper Sun Creek," "Lower Sun Creek," and "North or Lowest Sun Creek Field," attached to said settlement agreement, and attached hereto as Exhibit N, and made a part hereof.

(b) The above described acreage is confined to the acreage now under irrigation (except to the expansion of 216 acres of land lying immediately adjacent to and contiguous with the present irrigated Lower Sun Creek Meadow), as established by the survey

made in 1951 under the supervision of W. H. Settelmeyer, Licensed State Water Rights Surveyor, by John E. Hayes, as shown on those five certain maps, dated April 7, 1952, designated "Helen O'Neil Tract," "Bull Pasture," "Upper Sun Creek," "Lower Sun Creek," and "North or Lower Field on Sun Creek," and on file in the office of the State Engineer of Nevada, true copies of which are attached to said stipulation filed herein.

(c) Defendants herein Walter M. Gilmer and Bessie C. Gilmer, his wife, hereinafter referred to as the Owners of Gilmer Ranch, and their heirs, successors and assigns, are the owners of, have the right to use, and shall be entitled to annually divert from Camp Creek, without measurement thereof, sufficient water for domestic use, for stock water use on the lands hereinafter described and to beneficially irrigate 678 acres of land, more or less, more particularly described on those three pages marked Exhibit O and headed "Gilmer's Camp Creek Ranch," and "West Field on Camp Creek," attached to said settlement agreement, and attached hereto as Exhibit O, and made a part hereof.

(d) The above described acreage was established by the survey made in 1951 under the supervision of W. H. Settelmeyer, Licensed State Water Rights Surveyor, by John E. Hayes, as shown on those two certain maps, dated April 7, 1952, designated "Camp Creek" and "West Field on Camp Creek," and on file in the office of the State Engineer of Nevada, true copies of which are attached to said stipulation filed herein.

(e) The owners of the Gilmer Ranch shall withdraw Applications Nos. 11980, 11981 and 11983, filed with the State Engineer of Nevada, August 26, 1947, by Walter M. Gilmer to appropriate 10.75 c.f.s. of the waters of Sun Creek, and to withdraw Application No. 11982 filed with the State Engineer of Nevada on August 26, 1947, by Walter M. Gilmer to appropriate 6.4 c.f.s. of the waters of Camp Creek, and shall conform by appropriate transfer, amendment or by filing new applications, in a manner satisfactory to the State Engineer of Nevada, existing permits and certificates to the acreage above described.

(f) Said owners shall not appropriate any of the waters of the Salmon River or its tributaries for any other lands than those hereinabove specifically described, and shall confine the use of the waters of said streams to the lands described in said Exhibits N and O, and shall accept the waters herein provided for use on the said specific acreage and no other, as provided in this judgment in full satisfaction of any and all rights in and to the waters of the Salmon River and its tributaries which they have or might claim under either said Federal Court Decree of March 23, 1916, said Nevada State Court Decree of March 3, 1923, under the laws of the State of Nevada, or otherwise; and further shall not take any steps by means of applications for change of points of diversion or place of use, or otherwise, to use said water on any other or different lands other than those described in said Exhibits N and O.

(g) The owners of the Gilmer Ranch shall have the right to construct ditches to detour beaver dams

and other stream obstructions in Sun Creek, Deer Creek and Camp Creek. The owners of the Gilmer Ranch shall, in order to confine irrigation to the "North or Lower Fields of Sun Creek," comprising 25.04 acres, construct any necessary waste ditches or channels at the northern end of said tract to convey the return flow, or other available waters, directly into the main channel of Sun Creek.

(h) Plaintiff herein shall have no right to dredge or make channel changes on Camp Creek, Deer Creek or Sun Creek.

19. There shall be no diversion of water by defendants from the watershed of one stream to another (except only as provided in Paragraph 17 (a) hereof); and there shall be no reservoirs constructed by them, and no water shall be stored by them by man made works on Salmon River, or any of its tributaries, or upon any lands owned by them (except only for the reservoir provided for in paragraph 13 (e) hereof).

20. The rights to the use of the waters of the Salmon River and its tributaries (described in paragraphs 12, 13, 14, 15, 16, 17, and 18 hereof, and limited to the acreage therein described and in paragraph 26 hereof), shall be senior and paramount to the rights of the plaintiff. The plaintiff herein shall have the right as between the parties hereto subordinate only to the rights of the defendants as is in this judgment set out, to divert, have and use all of the waters of the Salmon River and its tributaries, for use upon the lands of its irrigation project in the State of

Idaho, with the right to transfer the place of use of such waters to said lands, and with the right to transfer for use in Idaho the water rights appurtenant to such lands as it may now or hereafter own in Nevada, including, but not limited to, the water rights formerly appurtenant to the lands in Nevada purchased by plaintiff by deed dated May 24, 1947; provided, that the plaintiff may at any time use said waters, or a portion thereof, on such lands as it may own in Nevada in lieu of the Idaho lands, at its option.

21. The State Engineer of Nevada on October 1, 1952, entered orders granting certain applications of plaintiff herein for transfer of water rights formerly appurtenant to Nevada lands purchased under said deed dated May 24, 1947, for use in Idaho, described in paragraph 5 hereof, (except Application No. 12895 which prior to October 1, 1952, was withdrawn by plaintiff herein), and on October 6, 1952, made a final determination that the water of the Salmon River and its tributaries, are fully appropriated, all as contemplated and provided for in paragraph 26 of said settlement agreement.

22. The action of the State Engineer of Nevada on October 1, 1952, granting said applications of plaintiff herein for transfer of said water rights is hereby ratified and confirmed.

23. Subject to such rights as may exist by virtue of certain applications made to State Engineer of Nevada and noted in his Opinion and Order hereinafter referred to, the waters of the Salmon River and its tributaries in Elko County, Nevada, are fully

appropriated and there is no surplus water available for appropriation for irrigation for use in the state of Nevada other than that which is provided for in this judgment. The Opinion and Order of the State Engineer of Nevada dated October 6, 1952, in terms and words as follows, is adopted, approved and ratified:

"In The Matter of the Determination of the Availability of Water for Irrigation Use on the Salmon River (Sometimes Referred to as Salmon Creek or Salmon Falls Creek) and Its Tributaries in Elko County, Nevada.

OPINION

It is the opinion of the State Engineer, after a thorough study of the water supply of the Salmon River and its tributaries, in Nevada and Idaho as reported in U.S.G.S. Water Supply Papers, Part 13, Surface Water Supply of Snake River Basin, the provisions of the so-called 'Dietrich Decree' in the District Court of the United States for the District of Idaho, Southern Division, dated March 23, 1916, and the provisions of the Salmon River Settlement Agreement dated May 20, 1952 that there is no surplus of water available for appropriation for irrigation use in the State of Nevada other than that which is provided for in the Settlement Agreement of May 20, 1952. It is expressly understood, however, that this Opinion and Order does not prejudice the right of the State Engineer to act without reservation upon all applications filed prior to the issuance of this Order for a permit to appropriate water in the State of Nevada filed in ac-

cordance with the statutory laws of the State of Nevada by an individual or corporation or a party to the Settlement Agreement heretofore referred to.

ORDER

It is the Order of the State Engineer that the waters of the Salmon River (sometimes referred to as Salmon Creek or Salmon Falls Creek) and its tributaries in Elko County, Nevada are fully appropriated and that no further permits will be granted for irrigation use on the stream system within the State of Nevada."

24. There is not annually available from Salmon River and its tributaries sufficient water to fill the water rights of the plaintiff herein as set forth in paragraphs 1 and 2 hereof; and all of the waters which will be available to the plaintiff herein under the terms and conditions hereof are and will be required for the proper irrigation of the lands included within plaintiff's irrigation project in the state of Idaho, which includes a gross area of 35,000 acres, and all of said waters can be beneficially used thereon.

25. Defendants herein have no right, title or interest in and to the waters of the Salmon River, and to its tributaries, except those specifically allotted to said defendants by the terms of this judgment.

26. Defendants herein shall use all reasonably diligent efforts to keep all ditches and channels on their respective lands clear and free from obstructions, and shall cooperate with the plaintiff in constructing and maintaining waste or drainage ditches which will return waste irrigation waters to the natural stream

beds after the same have completed their use upon the respective lands of defendants as herein provided; and defendants herein shall cooperate in every way possible with the proper state and federal authorities in the control of beaver activities to prevent interference with the flow of water in the Salmon River and its tributaries.

27. Plaintiff herein may, to the extent and in the manner, and at the time or times selected by it, erect permanent markers at or along the boundaries of the Nevada lands which are awarded prior rights hereunder as the same are described herein and shown on the maps referred to herein as being filed in the office of the State Engineer of the State of Nevada, true copies of which are attached to said stipulation filed herein.

28. None of the restrictions or limitations elsewhere herein contained shall prevent the defendants herein, or their successors in interest, from continuing to own or use, or in any way in the future, to acquire necessary water rights for stock watering purposes only in accord with the usual custom or practice of the area in order that they may properly use the range lands belonging to them or available to them in the drainage basin of the Salmon River and its tributaries.

29. This judgment shall be binding on the parties hereto, upon the successors and assigns forever of plaintiff herein and upon the heirs, executors, administrators and assigns forever of defendants herein, and this judgment shall specifically run with the lands

herein described and shall be binding upon all subsequent owners and occupants of said premises forever.

30. The settlement agreement dated May 20, 1952, entered into by and between the plaintiff and defendants herein, the original of which is attached to said stipulation filed herein, and the maps referred to herein as being on file in the office of the State Engineer of Nevada, designated respectively "Vineyard Ranch," "Hubbard Ranch," "Bridge Ranch," "Cottonwood Ranch," "Agee Home Ranch or Canyon Creek," "Home Ranch," "Calf Pasture Field," "Upper Ranch," "Home Tract," "Desert Entry," "Upper Tract," "Plantation Field," "Helen O'Neil Tract," "Bull Pasture," "Upper Sun Creek," "Lower Sun Creek," "North or Lower Field on Sun Creek," "Camp Creek," and "West Field on Camp Creek," true copies of which are attached to said stipulation filed herein, are hereby expressly ratified and approved.

31. This Court shall retain jurisdiction over matters of interpretation of this decree and matters relating to the administration and enforcement thereof.

32. The several parties to this action shall pay their own costs.

Done in open court this 6th day of July, 1953.

.....
District Judge

Filed Aug 24, 1953

In the United States District Court
for the District of Nevada

Case No. R2523

Salmon River Canal Co., Ltd., a corporation,
Plaintiff,
vs.
Bell Brand Ranches, Inc. and J. K. Wheeler, An individual, and Wheeler Machinery Company, a corporation, a Co-partnership, dba WD Ranching Co.,
Defendants,
and
State of Nevada, ex rel. Roland D. Westergard, State Engineer,
Intervenor.

[Filed Feb. 7, 1974]

AFFIDAVIT OF ROLAND D. WESTERGARD

State of Nevada }
Carson City } ss.

Your Affiant, Roland D. Westergard, being first duly sworn, deposes and says:

1. That at the present time he is the State Engineer for the State of Nevada, within the State Department of Water Resources.

2. That such Department has jurisdiction over all water permits within the State of Nevada.

3. That on May 11, 1966, W D Ranching Company filed with this office an Application for Permit to Appropriate Public Waters of the State of Nevada.

4. That on April 20, 1967 that application was granted as Permit No. 23135 with your Affiant signing such permit as the then Assistant State Engineer.

5. That such application was properly published in accordance with NRS 533.360 in the Wells Progress, Wells, Nevada, a newspaper of general circulation, from September 16, 1966 until October 14, 1966.

6. That the 30-day protest period as provided by law expired on November 13, 1966, and neither during that time nor at any time since did the above-named Plaintiff protest with the Office of the State Engineer the above-described application.

7. That said water application concerned a well commenced on February 24, 1966, and was completed on April 26, 1966, and that since the granting of the application until the present time, that well and the waters produced have been used during normal irrigation seasons.

8. That on October 2, 1967, W D Ranching Company filed with this office an Application for Permit to Appropriate Public Waters of the State of Nevada.

9. That on October 16, 1968, that application was granted as Permit No. 24152 with your Affiant signing such permit as the State Engineer.

10. That such application was properly published in accordance with NRS 533.360 in the Wells Progress, Wells, Nevada, a newspaper of general circulation, from January 19, 1968 until February 16, 1968.

11. That the 30-day protest period as provided by law expired on March 18, 1968 and during that time the above-named Plaintiff did not protest with the Office of the State Engineer the above-described application.

12. That the Plaintiff did file a late protest on June 24, 1968, that was not accepted by the Office of the State Engineer.

13. That said water application concerned a well commenced on October 2, 1967, and completed on December 23, 1967, and since the granting of the application until the present time that well and the waters produced have been used during normal irrigation seasons.

14. That copies of the above-referenced permits are attached.

Dated this 5th day of February, 1974.

/s/ Roland D. Westergard
Roland D. Westergard

Subscribed and sworn to before
me this 5th day of February, 1974.

(Seal) /s/ Gladys E. Anderson

Notary Public State of Nevada, Carson City

My Commission Expires July 2, 1977

In the United States District Court
for the District of Nevada

Civil No. R-2523 BRT

Salmon River Canal Co., Ltd., a corporation,
Plaintiff,
vs.
Bell Brand Ranches, Inc., et al.,
Defendants.

[Filed April 11, 1975]

AFFIDAVIT OF ROLAND D. WESTERGARD

State of Nevada
Carson City } ss.

Roland D. Westergard, being first duly sworn, deposes and says:

1. Affiant has personal knowledge of the matters stated herein, and is competent to testify as to those matters.

2. Affiant is State Engineer of the State of Nevada, within the Division of Water Resources, Department of Conservation and Natural Resources, and has custody of the public records hereinafter mentioned.

3. Said Division has jurisdiction over all water permits within the State of Nevada.

4. On June 21, 1967, Gilmer Ranches filed with said Division an Application for Permit of Appropriate the Public Waters of the State of Nevada, which Application was designated Application No. 23946 by the Division.

5. On August 21, 1967, Gilmer Ranches filed with said Division a corrected Application No. 23946.

6. The water whose appropriation was applied for was to be used for irrigation purposes outside the area covered by the Salmon River Agreement of 1952.

7. Said water was to have an underground source and be obtained from a well 700 feet deep.

8. Notice of said Application was duly published in accordance with NRS 533.360 in the Elko Independent, Elko, Nevada, a newspaper of general circulation, from August 31, 1967 to September 28, 1967.

9. The 30-day period provided by NRS 533.365, during which any interested person could file a protest against the granting of the Application, expired October 28, 1967.

10. No protests were filed.

11. On September 25, 1968, said Application was granted as Permit No. 23946, with Affiant signing said Permit as State Engineer.

12. The well driller's report subsequently filed with the Division indicates the well was drilled to a depth of 709 feet.

13. Ownership of the right to appropriate the water evidenced by Permit No. 23946 was duly transferred by the office of the State Engineer, pursuant

to NRS 533.385, to Bell Brand Ranches, Inc. on August 29, 1972.

14. Certified copies of the documents hereinabove mentioned are attached hereto and made a part hereof by this reference.

Dated: March 26, 1975.

/s/ Roland E. Westergard
Roland E. Westergard,
State Engineer

Subscribed and sworn to before me
this 26th day of March, 1975.

(Seal) /s/ Gladys E. Anderson

Notary Public State of Nevada, Carson City

My Commission Expires July 2, 1977

In the United States District Court
for the District of Nevada

Civil No. R-2523 BRT

Salmon River Canal Co., Ltd., a corporation,
Plaintiff,
vs.
Bell Brand Ranches, Inc., et al.,
Defendants.

[Filed April 30, 1975]

AFFIDAVIT OF ELMER PARROTT.

State of Idaho
County of Twin Falls } ss.

Elmer Parrott, being first duly sworn, deposes and states:

1. The affiant is the President of the plaintiff, duly elected and acting.

2. The affiant makes this Affidavit upon his own personal knowledge and information and in opposition to the Motion for Summary Judgment filed on behalf of the defendant Bell Brand Ranches, Inc.

3. The affiant denies that Roland D. Westergard has personal knowledge of all of the matters stated in his Affidavit, and the affiant affirmatively states

that much of the material contained in Westergard's Affidavit is a recitation of knowledge gleaned from records, which may be in his office and which speak only according to their own terms, and the Affidavit of Westergard is competent only to the degree that the instruments are competent evidence, except where he actually speaks from personal knowledge. See Westergard Affidavit, paragraph 1.

4. The affiant questions whether the jurisdiction of the Division of Water Resources, Department of Conservation and Natural Resources, is a factual question. See Westergard Affidavit, paragraph 3.

5. The affiant denies that the waters whose appropriation was applied for in Application 23946 were to be used outside the area covered by the Salmon River Settlement Agreement of May 20, 1952, and affirmatively states that according to the terms of the Application itself, the lands to which the waters were to be appropriated are some of the lands described in Exhibit N of the Salmon River Settlement Agreement and specifically referred to as the "Helen O'Neill", "Gilmer's Upper Sun Creek", and "Gilmer's Lower Sun Creek" areas, which were permitted to be watered with the waters of the tributaries of the Salmon River according to the Salmon River Settlement Agreement. Particularly, the Application makes reference to Section 25 of Township 44 South, Range 60 East, M.D.B.&M., and to Sections 28, 29, 30, 31 and 32 of Township 44 South, Range 61 East, M.D.B.&M., and the descriptions of land in the Salmon River Settlement Agreement, Exhibit N, makes ref-

erence to areas of land in Section 25, Township 44 South, Range 60 East, M.D.B.&M., and to Sections 28 and 29 of Township 44 South, Range 61 East, M.D.B.&M. Affiant concedes that the Application contains this legend under the category "Remarks": "This land to be irrigated is land outside the area covered by the Salmon River Agreement of 1952", but this reference was no part of the notice published in the Elko Independent, beginning July 31, 1967, and ending September 28, 1967, but rather the notice made reference only to the Section numbers as specified. There was, of course, no way to determine precisely where the waters would be used and appropriated until appropriation was completed. According to the Permit, No. 23946, proof of application to beneficial use was not required before March 25, 1973. Neither this affiant nor any of the officers of the plaintiff, nor their resident Nevada agent, had knowledge of the specification under "Remarks" in Application No. 23946 until the Affidavit of Roland D. Westergard was served upon the Company's attorney in early April, 1975. See Westergard Affidavit, paragraph 6.

6. The affiant agrees that according to the "Corrected" Application No. 23946, the waters in question were to be obtained from a well with the dimensions of 18 inches by 700 feet. This, however, is a prospective statement and does not disclose at what level water is actually obtained and from what level water is actually pumped, nor does it disclose the source of the underground water supply or its ultimate destination, if unimpeded by the pumping. In fact, the water supply is from the same source as the water

supply in the Salmon River and its tributaries and, if unimpeded, the underground source which is tapped by the well in question would reach the Salmon River and its tributaries and become part of the water supply available to the plaintiff under the Decree of this Court. See Westergard Affidavit, paragraph 7.

7. The affiant admits that notice of the Application was published in the Elko Independent, a newspaper of general circulation published in Elko, Nevada, on five occasions from August 31, 1967 through September 28, 1967, but he affirmatively alleges that the terms of the Notice are those specified in the Affidavit of Max C. Wignall, dated February 3, 1975, and attached as the next to the last Exhibit to the Affidavit of Roland D. Westergard filed in support of the Motion for Summary Judgment. No terms of notice were published other than those as specified in the copy of the Notice, as incorporated as part of Max C. Wignall's Affidavit. See Westergard Affidavit, paragraph 8.

8. The affiant admits that on September 25, 1968 the Application was granted as Permit No. 23946, according to the terms of the said Permit as set out as an Exhibit to the Affidavit of Roland D. Westergard filed in support of the Motion for Summary Judgment. Among the provisions of the Permit are the following:

> "This permit is issued subject to all existing rights on the source."

The provisions of the Permit are those specified in the Permit and there is no language in the Permit

which by its terms purports to be an adjudication that the ground water supply for the well in question is from sources of water other than the Salmon River and its tributaries. See Westergard Affidavit, paragraph 11.

9. The affiant concedes that the "Well Driller's Report" of Ralph C. Denton, Murtaugh, Idaho, attached as the final Exhibit to the Affidavit of Roland D. Westergard filed in support of the Motion, does specify that a depth of 709 feet was reached. However, the "Well Driller's Report" also specifies that a static water level of 98 feet below the land surface was achieved and that the "draw down" of the well reached a maximum of 420 feet. There is nothing in the "Well Driller's Report" which indicates that the waters appropriated are pumped from the full depth of the well. The "Well Driller's Report", by its terms, indicates quite a different situation. See Westergard Affidavit, paragraph 12.

10. No notice was ever served upon this affiant, by publication or otherwise, of the intention of the defendant Bell Brand Ranches, Inc., or its predecessors, to apply waters obtained from the well in question to lands other than lands specified in the Salmon River Settlement Agreement of May 20, 1952.

11. No adjudication, to the knowledge of this affiant, has ever been made by any judicial, administrative or quasi-judicial officer as to the source of the underground waters which are appropriated by this well.

12. The waters appropriated by the well in question and now applied to lands outside the boundaries permitted by the Salmon River Settlement Agreement of May 20, 1952, are waters which are tributary to the Salmon River and its tributaries and would otherwise be waters reserved for the use of the plaintiff by the Decree of this Court, if not impeded by the well of the defendant Bell Brand Ranches, Inc.

Dated this 28th day of April, 1975.

/s/ Elmer R. Parrott
Elmer Parrott

Subscribed and sworn to before me this 28th day of April, 1975.

(Seal) /s/ Lloyd J. Webb
Notary Public
Residence: Twin Falls, Idaho

Supreme Court, U. S.
FILED
APR 28 1978
MICHAEL RODAK, JR., CLE

In The

Supreme Court of the United States

October Term, 1977

No. 77-1392

STATE OF NEVADA, ex rel., ROLAND D. WESTERGARD, State Engineer, and BELL BRAND RANCHES, INC., a Nevada corporation, and J. J. WHEELER, an individual, and WHEELER MACHINERY CO., a corporation, a co-partnership, dba W. D. RANCHING COMPANY,

Petitioners,

vs.

SALMON RIVER CANAL COMPANY, Ltd., a corporation,

Respondent.

BRIEF OF RESPONDENT SALMON RIVER CANAL COMPANY, LTD. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COCKLE PRINTING CO., 1822 St. Mary's Ave., Omaha

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In The

Supreme Court of the United States

October Term, 1977

No. 77-1392

STATE OF NEVADA, ex rel., ROLAND D. WESTERGARD, State Engineer, and BELL BRAND RANCHES, INC., a Nevada corporation, and J. J. WHEELER, an individual, and WHEELER MACHINERY CO., a corporation, a co-partnership, dba W. D. RANCHING COMPANY,

Petitioners,

vs.

SALMON RIVER CANAL COMPANY, Ltd., a corporation,

Respondent.

BRIEF OF RESPONDENT SALMON RIVER CANAL COMPANY, LTD. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioners' Statement of the Case omits reference to many significant factual matters. Respondent accordingly submits the following additional information concerning the case:

I.

The Judicial Decree of 1953

Central to Respondent's claim is a judicial decree entered by U. S. District Court and dated July 6, 1953, relating to the use of the waters of the Salmon Falls Creek and its tributaries (Tr. pp. 2-3). The decree, though unique in its way of governing the allocation of the waters of Salmon Falls Creek and its tributaries,

expressly limited the application of irrigation water by water users, other than the Respondent, to specifically described acreage (Tr. pp. 90-146).

The decree by its terms bound the parties subject thereto and further provided that the judgment would be binding on the "heirs, executors, administrators, and assigns" of the defendant parties (Tr. p. 113). Petitioners, Bell Brand Ranches, Inc., and J. K. Wheeler and Wheeler Machinery Company (hereinafter Co-Petitioners) are the assignees or successors in interest of certain of those party defendants subject to the decree and thereby are subject to the decree themselves (Tr. p. 1171 Bell Brand Ranches, Inc.); (Tr. p. 119 Petitioner J. K. Wheeler and Wheeler Machinery Company).

The specific language of the decree regarding the application of the waters of the Salmon River and its tributaries is as follows:

> "Said owners shall not appropriate any of the waters of the Salmon River or its tributaries for any land other than those hereinabove specifically described, and shall confine the use of the waters of such streams to the lands described . . . and shall accept the waters herein provided for use on the said specific acreage and no other, as provided in this judgment in full satisfaction of any and all rights in and to the waters of the Salmon River and its tributaries. . . ." (Tr. p. 109 Bell Brand Ranches, Inc.); (Tr. p. 102 J. K. Wheeler and Wheeler Machinery Co.).

It is uncontroverted that the co-petitioners do not deny that they were applying water to lands outside of the decree's specifically described lands. It would appear that it would be Co-Petitioner's contention that the waters so applied are not tributary to the Salmon River and its

tributaries. This contention is purported supported by the Petitioners pointing to the issuance of water permits to Co-Petitioners which they claimed are inferentially conclusive evidence of an administrative determination that the underground waters covered by said permits are not tributary to the Salmon River or its tributaries.

It is the contention of the Respondent, however, that the underground water so applied by Co-Petitioners to lands other than those specifically described in the 1953 decree are tributary to the Salmon River and its tributaries and that the permits issued to the Co-Petitioners are in contravention of said decree and are void in as much as the permits attempt to abrogate the pre-existing water rights of the Respondents as determined under the 1953 decree.

Respondent additionally respectfully urges that the District Court by the terms of the before-mentioned decree retained jurisdiction, "over matter of interpretation of this decree and matters relating to the administration and enforcement thereof." (Tr. p. 113). Respondent would contend that by the express terms of the 1953 adjudication the District Court, not the Nevada State Engineer, had jurisdiction over the present case to adjudicate the relative water rights of the parties.

II.

The Water Permits

All the water permits now in question, which were either issued to Co-Petitioners or their predecessors in interest, contained an express reservation which reads as follows:

"This permit is issued subject to all existing rights on the source." (Tr. pp. 935-936, 939-940, 1130).

It is the Respondent's position that these reservations in Co-Petitioners' permits recognize that Co-Petitioners' permits were issued subject to the existing water rights of Respondent and, accordingly, subject to adjudication under the terms of the decree of July 6, 1953.

III.

Reasons for Denying the Writ

A. Failure to satisfy the considerations of Rule 19(1)(b).

The Respondent respectfully contends that the Ninth Circuit Court of Appeals in their decision, dated November 21, 1977 (Petitioners' Appendix "A", p. 2), did not render a decision "in conflict with the decision of another Court of Appeals on the same matter," and further that the decision of the aforesaid Court did not "conflict with applicable state . . . law." (Rules of the Supreme Court of the United States, Rule 19 (1) (b)). This contention will be fully argued by the Respondent in the following subheadings under this topic.

1. The absence of any conflict with the decisions of this Court or of another Court of Appeals on the same matter.

Petitioners claim that the water permits issued by the Nevada State Engineer to Co-Petitioners are final and conclusive and bar any judicial review of the State Engineer's determination to grant the said permits and a claimed inferential decision of separate water source in making the said determination because Respondent did not protest the issuance of the permits at the administrative level. The Ninth Circuit Court of Appeals in their opinion concluded that the water permits were not final and conclusive as to the water rights of the parties because of the fact that the permits were administrative tools (Petitioners' Appendix "A", pp. 5-6), issued by an agency of the State which had neither primary nor exclusive jurisdiction (Petitioners' Appendix "A", p. 12), to adjudicate water rights in the State of Nevada, and for the further reason that the Respondent held pre-existing water rights, under a previous judicial decree rendered in 1953, reserving jurisdiction over the interpretation, administration and enforcement of said decree, which Respondent maintains is in conflict with the issued permits that are the center of this dispute. The opinion also, after an analysis of the relevant statutes, found that there are only two avenues of determining water rights with finality and with conclusiveness under the statutory scheme of Nevada: administratively (per NRS §§ 533.090 et seq.); and through the institution of a suit in a State District Court pursuant to NRS § 533.240 (Petitioners' Appendix "A", p. 13). These finalizing avenues were not pursued by the Co-Petitioners in this case.

a. Cases relied upon by the Petitioners to evidence conflict between the present opinion of the Court of Appeals and the decisions of this Court and other Courts of Appeals.

A case heavily relied upon by the Petitioners to evidence a conflict between the decision of the Ninth Circuit Court of Appeals and this Court and sister Courts of Appeals is *United States v. Utah Construction & Mining Company,* 384 U. S. 394 (1966). This citation as author-

ity, however, is inapposite to the instant facts. In *United States v. Utah Construction & Mining Company,* supra, this Court found that the doctrine of res judicata applies to administrative determinations where the administrative agency is (1) acting in a judicial capacity; (2) resolving disputed issues of fact properly before it and, finally, (3) where the parties to the dispute have had an adequate opportunity to litigate.

In the case presently before the Court for consideration, the Ninth Circuit Court of Appeals found that the state agency involved in the determination was not acting in a judicial or quasi judicial capacity. Indeed, the opinion of the Appeals Court found that the agency's approval of appropriative permits is largely ministerial (Petitioners' Appendix "A", p. 6). The Appeals Court conclusion rested in the main on the statutory language of NRS § 533.370 (1) indicating the small amount of discretion delegated to the State Engineer and NRS § 533.430 (1) showing that the appropriative permits are subject to further review and determinative action (Petitioners' Appendix "A", pp. 7-8). Coupled to this, is the Appeals Court conclusion that the only two avenues of finalizing and/or adjudicating water rights were not pursued by the Co-Petitioners in regard to the water rights claimed under the issued permit. Since these avenues were not pursued there can be no claim by the Petitioners that the issuance of the water permits finally and conclusively decided the disputed issue as to whether the appropriated underground waters, as evidenced by said permits, were tributary to the Salmon River and its tributaries. These findings would successfully preclude two of the requisites of the *United States v. Utah Construc-*

tion & Mining Company decision; (1) the necessity of the administrative agency acting in a judicial capacity, and (2) that of having an adequate opportunity to litigate, the later preclusion for the reason that the Co-Petitioners never pursued the administrative route of final water rights resolution per the provisions of NRS §§ 533.090 to 533.525, inclusive.

It is crucial to remember also that the *United States v. Utah Construction & Mining Company* decision involved the interpretation of a government contract where the appropriate law, the Wunderlich Act (28 USC, § 1346), specifically provided that the determination of the administrative agency would be binding. In this case there is no such statutory provision providing that the permit issued by the Nevada State Engineer is conclusive as to water rights, absent the compliance with the provision of NRS §§ 533.090 to 533.525, inclusive, or the resolution of water rights by a State District Court, pursuant to NRS § 533.240.

Another pertinent fact to be interjected at this point in regard to the conclusiveness of the water permits issued by the Nevada State Engineer is the fact that even though the Respondent did not protest the issuance of the permits there was no need to do so as the Appeals Court emphasized:

> "We also note that there is no statute, called to our attention or found in independent research, that requires a protest at the peril of losing pre-existing rights by failing to protest. Nor has any case been brought to our attention, either in Nevada or from any of the arid western states, which holds that a failure to protest a permit application will render the

determinations made in the application final and conclusive to the extent that they may impair or obliterate pre-existing rights." (Petitioners' Appendix, "A", p. 10).

Under the 1953 Decree the Federal District Court reserved to itself the "jurisdiction over matters of interpretation of this decree and matters relating to the administration and enforcement thereof," (Petitioners' Appendix "A", p. 3). This being the situation, the issue of whether or not the underground waters are tributary to the Salmon River and its tributaries could not properly be presented to the State Engineer for determination. Thus, the remaining requirement of the *United States v. Utah Construction & Mining Company* decision, that of the issues of fact being properly before the agency, was not met in the issuance of the water permits because the Respondent was not mandated by statute to protest the permit issuance, and by the fact that pursuant to the express terms of the 1953 Judicial Decree, the Courts, not the State Engineer had to determine whether the decree applied to the underground waters in question.

The other cases cited by Petitioners for showing an apparent conflict between the instant decision and the decisions by this Court and other Courts of Appeals fare no better than the *Utah Construction* case for precedential value when examined. All of the decisions of this Court and the Courts of Appeals cited by Petitioners for the propositions of res judicata, collateral estoppel, primary jurisdiction and the doctrine of exhaustion of administrative remedies involve administrative agencies which either: (1) have specific statutory authority giving conclusive effect to their determinations (*Myers v. Bethlehem*

Shipbuilding Corporation, 303 U. S. 41 (1938); *Seafrain Lines v. Pennsylvania R. R. Company,* 207 F. 2d 255 (3rd Cir. 1953); *United States v. Willard Tablet Company,* 141 F. 2d 141 (7th Cir. 1944); *Woo Foo Wong v. Wixon,* 117 F. 2d 926 (9th Cir. 1941)); (2) have complied with the standards for an adjudicative procedure (*Paramount Transport System v. Chauffers Local,* 436 F. 2d 1064 (9th Cir. 1971); *Marnell v. United Parcel Service of America,* 260 F. 2d 391 (N. D. Cal. 1966)); (3) have exclusive jurisdiction over the subject matter (*Far East Conference v. United States,* 342 U. S. 570 (1952); *SEC v. Central-Illinois Securities Corporation,* 338 U. S. 96 (1949); *Myers v. Bethlehem Shipbuilding Corporation,* supra); or (4) have elements of one, two, or all of the foregoing factors in order to produce the decisional result (*McKart v. United States,* 395 U. S. 185 (1969); *Dennison v. Payne,* 293 F. 333 (2nd Cir. 1923)). The Petitioners' allusion to *Jahn v. 6th Judicial District Court,* 58 Nev. 204, 73 P. 2d 499 (1937), as supported by *United States v. George S. Bush & Company,* 310 U. S. 371 (1940), and *Kaoru Yamataya v. Fischer,* 189 U. S. 86 (1903), is inappropriate too for the reason that *Jahn,* supra, is a case where the water rights had been fully adjudicated, both administratively and judicially, which is not true in the present case, thus rendering the cites of *Kaoru Yamataya,* supra, and *George S. Bush & Company* inapposite.

In this case the application procedure employed by the Co-Petitioners is not given conclusive effect by either statute or by case law. The application procedure employed by Co-Petitioners in this case is not adjudicatory in nature, as will be discussed infra under subheading *B (1),* and therefore the doctrines of res judicata and

collateral estoppel would not apply. In addition, as will also be discussed infra under subheading *B*, the Nevada State Engineer does not have exclusive jurisdiction over the adjudication of water rights under Nevada law, thereby excluding any argument for the Engineer's primary jurisdiction. This last point of no primary jurisdiction residing in the State Engineer is strongly reinforced by the expressed reservation in the 1953 decree previously referred to which expressly reserved in the rendering court the continuing jurisdiction over matters of interpretation, administration and enforcement of the water rights of the Salmon River and its tributaries.

Based therefore on the foregoing, as demonstrated by an examination of Petitioners' authority, it is respectfully urged that there is an absence of any conflict between the instant decision of the Ninth Circuit Court of Appeals and any decision of this Court or of a sister Court of Appeals.

2. The absence of any conflict between the Court of Appeals decision and applicable state law.

The opinion of the Appeals Court does not conflict with the applicable state law. This is true of both the applicable statutory scheme and the case law of Nevada as evidenced by the Court decision of that state.

(a) The statutory scheme.

As previously mentioned in this reply, there is no statute specifically bestowing conclusiveness to a water permit issued by the Nevada State Engineer, absent the compliance with NRS provisions §§ 533.090 to 533.525, inclusive, for an administratively conclusive determination

or a judicial resolution by a State District Court pursuant to NRS § 533.240 (Petitioners' Appendix "A", p. 13). In the case presently before this Court for consideration, the Petitioners did not comply with the above cited provisions for an administrative determination. Neither did they institute a suit in a State District Court to determine whether they could appropriate the water which is the subject of the issued permits. This indicates that the permits issued to the Co-Petitioners are not final determinations and are subject to further review, as concluded by the Ninth Circuit's opinion.

Another indication that there is no conflict between the Ninth Circuit's opinion and the applicable Nevada Statutory provisions is the fact, as pointed out by the opinion, that the provisions governing the application for water permits are found under a different subchapter heading from those dealing with the adjudication of domestic water rights. (See NRS §§ 533.325 et seq. (application provisions) and §§ 533.090 to 533.320, inclusive (adjudication procedures)). It is not an overwhelming fact, but one that evidences the distinction between the two procedures.

(1) The application procedure.

As to the application procedures, it is apparent that the Nevada State Engineer is grossly limited in the discretion that he may utilize in approving applications for water permits. For example, NRS § 533.370.1 directs:

> "Except as provided in subsection 2, (not relevant to our discussions) the State Engineer *shall* approve *all* applications made in proper form where all fees, as provided in this chapter, have been paid which con-

> template the application of water to beneficial use, and where the proposed use or change does not *tend* to impair the value of existing rights, or to be otherwise detrimental to the public welfare." (Emphasis added).

The only determination that can be made by the State Engineer under the foregoing language is one of tendency. How could it be argued that finality attaches to a decision concerning the tendency to impair the value of existing rights. It is elemental that there would have to be further inquiry and review as to a dispute involving existing, vested rights.

NRS § 533.430(1) is also statutory evidence of the restrictions placed on the permits issued by the State Engineer. It reads in pertinent part:

> "Every permit to appropriate water, and every certificate of appropriation granted under any permit by the State Engineer upon any stream or stream system which shall have been adjudicated under the provisions of NRS 533.090 to 533.525, inclusive, shall be, and the same is hereby declared to be, subject to existing rights and to the decree and modifications thereof entered in such adjudication proceedings, and the same shall be subject to regulation and control by the State Engineer and the Water Commissions in the same manner and to the same extent as rights which have been adjudicated and decreed under the provisions of this chapter. . . . "

As stated above, the permits are subject to existing rights and this highlights the distinctiveness between the application and the adjudicative procedures of the provisions governing Nevada's water allocation system. The statute also emphasizes the fact that only if the administrative procedures of NRS §§ 533.090 to 533.525, inclu-

sive, are employed is the appropriation of water considered resolved and subject to the State Engineer's regulation and control. The permits issued to the Co-Petitioners stress the non-finalty of the application procedure by containing the above-mentioned statutory reservation:

> "This permit is issued subject to all existing rights on the source." (Tr. pp. 939-940, pp. 935-936).

Surely if the permits that are issued carry such a reservation, the "tendency" decision made by the State Engineer under NRS 533.370.1 cannot be considered adjudicative in nature or the express reservation mentioned in NRS § 533.430(1) and on the permits themselves are superfluous and meaningless.

A final point weighing against the inferential conclusion that by issuing the permits to Co-Petitioners the State Engineer conclusively determined that the underground waters, which are the subject of the permits, are not tributary to the Salmon River and its tributaries is evidence in the record that a conflicting opinion and ruling of the State Engineer, dated May 6, 1971 (R. pp. 1035-1037) (seq.) (Petitioners' Appendix "A", p. 9) covering well permits appropriating underground waters, in the same Salmon River basin where the instant questioned permits pertain to, by direct inference hold that the underground waters are tributary to the Salmon River. This ruling, of course, would be in direct conflict with the issued permits in this case. If the permits, issued in pursuance only to the application procedures, are final and adjudicative in nature and the reservation as to existing rights are meaningless, what recourse would the holders of conflicting pre-existing water rights have?

(2) The adjudication of vested water rights.

Under the statutory scheme of Nevada's permit system there is a route which can be pursued to administratively determine the relative water rights of claimants; NRS § 533.090, et seq. As explained by the Appeals Court, this procedure is a "stepping stone" to the judicial system. The administrative determination, when filed with the proper court, has the legal effect of a complaint in a civil action. NRS § 533.160(1). The Court can, after applicable notice and hearing procedures, modify or affirm the administrative determination. The decree of the court is final and conclusive. NRS § 533.210(1). This route was not pursued by the Co-Petitioners.

If the permit application procedure was envisioned to be conclusive, why the inclusion of the above described procedure to administratively determine the relative rights of water claimants? The other avenue or route already alluded to earlier in this reply is the institution of a suit in a State District Court to determine the relative rights of water claimants. NRS § 533.240. That this route can be exclusive and alternative to the administrative route of NRS § 533.090, et seq., is clear from the language of NRS §533.310 which states in speaking about State Court adjudication of water rights and its effect:

> "In which suit (District Court adjudication where a final decree has been entered) the adjudication and determination was not had in the manner provided in NRS §§ 533.090 to 533.265, inclusive, . . . "

The above language is reinforced by the wording of NRS § 533.240 to the effect that:

> "The court may at any time transfer the suit to the State Engineer for determination as provided in this chapter."

And by the language of NRS § 533.450(1) which states that:

> "On stream systems where a decree of court has been entered, the action shall be initiated in the court that entered the decree."

Petitioners rely on the provisions of NRS § 533.430(1) to show that the State Engineers determinations are adjudicative and conclusive. However, an inspection of the statute reveals that the provision is only operative after the strictures of NRS §§ 533.090 to 533.235, inclusive, have been complied with making the reference to this section inappropriate for the instant factual circumstance, since NRS § 533.090, et seq., was not complied with by Petitioners.

The Appeals Court concluded after a comparison between the application and adjudicative procedures that it would be erroneous to conclude that the State Engineer had primary or exclusive jurisdiction over the adjudication of water rights under Nevada's permit system. This is crystalline from the language of NRS §533.240, NRS § 533.310 and § 533.450(1) cited above. Also to be concluded by this comparison is the undeniable fact that a permit is not conclusive as to relative rights until the procedures as outlined by NRS § 533.090, et seq., or NRS § 533.240 are completed.

The Appeals Court to reinforce its decision in this matter of conclusiveness as to permits bolsters the proposition by citing to an impressive array of authorities both primary and secondary (Petitioners' Appendix "A" pp. 13-18). The pertinent and by far the most persuasive is a quote from 1 Hutchins, Water Rights Laws in the Nineteen Western States, 19-20 (1971) which states:

"The original water administration law of Nevada contained a provision based on those of Wyoming and Nebraska purporting to make the State Engineer's determination of water rights conclusive, subject to the right of appeal. This was believed by a majority of the Nevada Supreme Court to be unconstitutional. The law was promptly changed by the legislature to conform to the Oregon system in which judicial as well as administrative process is requisite to the effectiveness of the determination. The amended Nevada procedure was held valid."

The Respondent, based on the foregoing discussion would respectfully urge that there is no conflict between the statutory provisions of Nevada's water permit system and the decision of the Ninth Circuit Court of Appeals.

(b) Case law of Nevada.

(1) Proof by negation.

As pointed out by the Appeals Court in their opinion, the cases of *In Re Determination of Relative Rights: Frank Town Creek Irrigation Company v. Marlette Lake Company,* 364 P. 2d 1069 (Nev. 1961); *Jahn v. 6th Judicial District Court,* 73 P. 2d 499 (Nev. 1937); and *Ruddell v. 6th Judicial District Court,* 17 P. 2d 693 (Nev. 1933) are distinguishable from the instant case in that two of the cases, *Ruddell and Jahn* involved an affirmation of the binding effect of procedures similar to NRS § 533.090, et seq., after full adjudication and in the case of *Jahn* adjudication both administratively and judicially. The *Frank Town* case likewise was merely an affirmation of the procedures mandated by NRS § 533.090, et seq. These cases in no way stand as precedent for the conclusiveness of the application procedures. Neither do they

stand for a principle of the primary or exclusive jurisdiction of the State Engineer.

Other Nevada cases cited are also inapposite to the present case and are not pertinent to the issues of said case. *Round Mountain Mining Company v. Round Mountain Sphinx Mining Company,* 36 Nev. 543, 138 P. 71 (1914), which Petitioner cites for supporting the proposition that Respondent by failing to protest the issuance of Co-Petitioners' permits waived its rights in the present case, involved the issuance of patents to mining locations, where the decisions of the administrative agency are usually conclusive. However, even mining location patents can be collaterally attacked per the opinion of *Round Mountain,* supra, if the questioned patent is invalid by reason of a previous patent disposing of the land. As stated in *Round Mountain:*

"A failure to assert adverse rights, however, will not estop an adverse claimant from protesting and bringing to the notice of the department such facts as tend to show non-compliance by the applicant with the requirements of the law. Id. at 138 P. 73."

This same idea is formulated in the administrative procedure under NRS § 533.090, et seq., and as outlined above, NRS § 533.090, et seq., allows conflicting claimants an avenue for the determination of their relative rights.

In Re Water Rights in the Humboldt River Stream System, 49 Nev. 357, 246 P. 692 (1926), cited by the Petitioners as analogous to the instant facts, is not analogous. *In Re Water Rights in the Humboldt River Stream System,* supra, involved a case where provisions similar to NRS § 533.090, et seq., has been complied with and the State Engineer had filed the administrative determination with a State District Court (See NRS § 533.240, su-

pra) for final adjudication. As Respondent has repeatedly stated, Petitioners have not complied with the demands of the statutory adjudication procedures so the case is inapposite as an authority. Additionally, the appeal for an injunction in *In Re Water Rights in the Humboldt River Stream System,* supra, was made in the same judicial proceeding where a final court decree was pending which was contrary to statute. This is not the situation in the present case.

Finally, the citation to the case of *Humboldt Lovelock Irrigation Light & Power Company v. Smith,* 25 F. Supp. 571 (DC Nev. 1938) is inappropriate since the case involves a factual situation where the State Engineer found that pre-existing water rights conflicted with the appropriations allowed to the Plaintiff by the State Engineer. This case only underlines the contention of the Respondent that the appropriations allowed by the State Engineer are not conclusive. Also the case expressly states that the State Engineer's determinations are subject to judicial review. *Humboldt Lovelock Irrigation Light & Power Company v. Smith, Id.* at 575. This would be especially so in this case where the right to interpret the decreed water rights was specially reserved by the rendering court (Tr. p. 113).

(2) Affirmative proof.

As to affirmative proof that the decision of the Appeals Court is not in conflict with the applicable state law, the opinion cites the holding in *Chappellet v. Birbeck,* 296 P. 2d 946 (Nev. 1956), where the lessees of certain farm lands notified the lessors that they were electing to terminate the lease, relying upon a provision of their

lease agreement which provided that they may do so "in the event there is an insufficient supply of water . . .to properly irrigate." The lessors brought a damage action against the lessees for breach of the lease. It was established that the lessor had a water right appurtenant to the farm lands in question to divert 5 c. f. s. of underground water. At trial the lessees produced expert testimony to the effect that the underground source had the capability of providing no more than .085 c. f. s. of water, which was insufficient to irrigate. The lessors objected to this testimony since they claimed that their water right gave them the right to pump 5 c. f. s. of water and that it was error for the court to receive the expert testimony of the lessees because the testimony constituted "an improper attack upon their water right and upon the determinations of the State Engineer upon which it was based." The response of the Nevada Supreme Court to this contention was as follows:

> "Defendant's evidence was no attack upon lessor's water right. The evidence served simply to establish factually the extent of the limitations which the certificate recognized to exist." *Id.* at 296 P. 2d 949.

The above cited language infers that the reservations on the Co-Petitioner's permit in this case are meaningful and subject to judicial determination since the judicial determination would not be an attack on the water permits as such, but only a determination as to the extent of the limitations expressed by the wording "subject to all existing rights" appearing on the permit.

Respondent would therefore respectfully urge this Court, that based on the inapplicability of Petitioners' authority and upon the affirmative showing by Respond-

ent, that this Court deny the Petition for a Writ of Certiorari since the Petitioners have not demonstrated any conflict between the decisions of the Ninth Circuit Court of Appeals and any applicable state law nor have Petitioners demonstrated any conflict between the instant decision and the decisions of this Court or of a sister Court of Appeals.

IV.

Summary Judgment

Petitioners argue that the Ninth Circuit Court of Appeals in not affirming the Summary Judgment entered by the District Court failed to assign the proper significance to the Rule 56 (e) of the Federal Rules of Civil Procedure. At the threshold level, Petitioners have ignored the concurring opinion of Judge Schwarzer which summarizes the factors making this case inappropriate for Summary Judgment. Judge Schwarzer concluded that Summary Judgment was inappropriate in as much as that claim (Respondent's) involves (1) factual issues concerning the interpretation of the language of the decree (1953 Judicial Decree) in light of evidence of the intention of the parties, and (2) factual issues concerning the effect of defendants taking of water on plaintiff's rights, it cannot be said that there are no genuine issues of material fact to be tried. (Petitioners' Appendix "A", pp. 21-22) (Parentheticals added).

In addition, as has been pointed out earlier in this reply, the bases of the District Court's Summary Judgment; that is the State Engineers primary and exclusive jurisdiction to adjudicate water rights in the State of

Nevada and the operation of res judicata and collateral estoppel as to said determination of the State Engineer in issuing permits to the Co-Petitioners do not apply according to the majority decision of the Ninth Circuit. This being the situation, one would never reach the demands of Rule 56 (e) since the Petitioners did not sustain their burden of clearly establishing the lack of any triable issue of fact. Therefore, Summary Judgment was not warranted at the trial level even if the non-moving party (Respondent) did not offer any responsive affidavit or other materials. *Adickes v. S. H. Kress and Company,* 398 U. S. 144 (1970).

It is also to be noted that there are many restrictions and cautions in applying Rule 56. Respondent in its Brief (Appellant's Brief, pp. 16-21), cites numerous decisions which enunciate the basic caution that Summary Judgment should only be employed where it would not cut litigants off from their right of trial if they really have issues to try. See e. g., *Sator v. Arkansas Natural Gas Corporation,* 321 U. S. 620, 627 (1944). As determined by the Court of Appeals in this case, the bases of the District Court's Summary Judgment are erroneous and therefore Respondent is entitled to litigate the matter of whether the permits issued to Co-Petitioners are in contravention of the 1953 Judicial Decree governing the water rights of the Salmon River and its tributaries.

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CONCLUSION

Respondent, based on the failure of Petitioners to show any conflict between the instant decision of the Ninth Circuit Court of Appeals and the decisions of this Court or of any sister Court of Appeals or with any applicable state law, would respectfully urge this Court to deny the requested Petition for a Writ of Certiorari.

DATED this 27 day of April, 1978.

Respectfully submitted,

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